THE CHALLENGE OF THE EXCEPTION

George Schwab

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THE CHALLENGE OF THE EXCEPTION

An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936

Second Edition, with a New Introduction

GEORGE SCHWAB

CONTRIBUTIONS IN POLITICAL SCIENCE, NUMBER 248

GREENWOOD PRESS

New York
Westport, Connecticut
London

Library of Congress Cataloging-in-Publication Data

Schwab, George.
The challenge of the exception : an introduction to the political ideas of Carl Schmitt between 1921 and 1936 / George Schwab.—2nd ed., with a new introd.
p. cm.—(Contributions in political science, ISSN 0147–1066 ; no. 248)
Includes bibliographical references.
ISBN 0-313-27229-8 (lib. bdg. : alk. paper)
1. Schmitt, Carl, 1888– . 2. State, The—History—20th century. 3. Political science—Germany—History—20th century. 4. Germany—Politics and government—1918–1933. 5. Germany—Politics and government—1933–1945. I. Title. II. Series.
JC263.S34S35 1989
320'.092—dc20 89–17164

British Library Cataloguing in Publication Data is available.

The first edition published by Duncker & Humblot, Berlin.

Library of Congress Catalog Card Number: 89–17164
ISBN: 0–313–27229–8
ISSN: 0147–1066

First published in 1989

Greenwood Press, Inc.
88 Post Road West, Westport, Connecticut 06881

Printed in the United States of America

The paper used in this book complies with the Permanent Paper Standard issued by the National Information Standards Organization (Z39.48–1984).

10 9 8 7 6 5 4 3 2 1

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The difficulty I encountered at Columbia was primarily due to the fact that Schmitt's character had become fused with his work, and an analysis of his ideas was thus nearly impossible. But if the intellectually-tainted atmosphere that prevailed at Columbia and elsewhere in the United States is no longer an obstacle to serious work, there are other dimensions that make the study of his work difficult. Schmitt, the trained jurist, operates primarily in the legal domain, especially constitutional theory and constitutional law, and often the components of his political theory have to be extrapolated from his legal writings. Because intellectual historians, as well as other scholars, usually have no legal training or display much interest in legal studies, their conclusions about Schmitt's work have often been faulty, thus clouding a complex subject. Still another factor that constitutes a drag

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to Schmitt studies is the way in which the leaders of political movements and intensely-inspired ideologues often, under the guise of scholarship, have appropriated and diffused his ideas.

The more than thirty years that I have spent studying the ideas of Schmitt have led me to conclude that three phases are discernible in the progress of Schmitt studies in the English-speaking world. From the time of Hitler's accession to power until about the early 1970's the mere mention of Schmitt's name usually aroused such hostility that no objective discussion was possible. The decade of the 1970's can be characterized as years in which firm foundations were laid for Schmitt studies[2], and since 1980, here and elsewhere, there has been a near explosion of Schmitt studies: on Schmitt himself[3], on his ideas[4], on how they relate to the ideas of other thinkers[5], and on the influence that his ideas have had on younger scholars and thinkers[6]. The explosion[7] has been fueled by the number of his works that have appeared in translation[8].

Although it is not surprising that legal scholars, political scientists, and historians should concern themselves with many of Schmitt's ideas, the reasons why and how they have been appropriated by the leaders of political movements and ideologues are not that obvious. As far as the Weimar republic is concerned, the political right, for example, began to take note of Schmitt toward the end of the republican period. His conservative leanings, his trenchant analysis of the state, politics, and sovereignty, inextricably linking the three and favoring strong state power, coupled with his intellectually incisive critique of the spirit and practice of parliamentarism, endeared him to the right[9]. Consistent, however, with the ideological approach of political extremism, his thoughts were truncated and manipulated. Says Joseph Bendersky:

> In the hands of the editors of *Die Tat*, Hans Zehrer and Horst Grüneberg, Schmitt's ideas became clay, molded or disregarded to suit their own arguments, and his scholarship became a credible source to cite in defense of a particular point. Rarely were Schmitt's writings explained fully. In their relentless assaults on the republic, these authors used a simplistic interpretation of Schmitt's book on parliamentarism to prove that parliamentary government is 'at the point of death.' . . . As a result, Schmitt's writings, which had long been praised for their scholarly value, were turned into political propaganda; carefully formulated concepts became catchy slogans[10].

Inasmuch as the goals, if not the values, of the political right often converge with those of the political left, it is not surprising that the left too has turned to Schmitt[11]. The attention that is being focused on the intellectual roots of

the Frankfurt School, for example, and on some of the individuals associated with that school, has produced arresting reading. Ellen Kennedy argues that to the extent to which critical theory is a construct of political theory, the Frankfurt School is heavily indebted to Schmitt's critique of liberalism. Among other examples, she cites the school's debt to him by reminding us that Schmitt's analyses of the "contradictions between liberalism and democracy," according to which he concluded that liberalism negates democracy and democracy, liberalism, became basic to the Frankfurt School. Kennedy says that Schmitt "provided the radical critics of liberal democracy important principles and concepts [with which] to analyze the bourgeois *Rechtsstaat* and provided a basis to analyze the problem of political power . . . which could then be utilized for an outline of a theory of the state of the left"[12].

Moreover, given the political left's traditional failure to offer a theory of the state because of its refusal to reckon with historical realities, especially the state's unwillingness to wither away, the left lacked the ability to analyze it[13]. In view of the centrality accorded to the state in Schmitt's works, it is understandable why the left was drawn to his rich basket of analytical tools with which to realistically examine the state, politics, and sovereignty[14].

The thoughtful, English, moderate-left scholar Paul Hirst is a most recent example. After having searched the range of Marxist thought for answers about how best to construct a working constitution for an industrially-advanced Western democratic socialist state, one that would acknowledge the realities of state power and how such power could be reconciled with a societal order based on democratic socialist values, he rejected answers that were, in fact, nonanswers provided by Marxist thinkers. He turned to Schmitt instead. Though often critical of him, Hirst was impressed by Schmitt's efforts to confront the exception, that is, to subject it to legal considerations. He said Schmitt "addresses the problems of antagonistic pluralism, emergency powers and constitutional dictatorship nowhere available in the liberal and Marxist traditions"[15]. Though Hirst shares Schmitt's conclusion that a constitutional order must make provisions for the exception, he is considerably more moderate in his approach than Schmitt. This can be explained perhaps by the relatively peaceful evolution of England's constitutional history. Whatever the reason, Hirst argues that in order to ensure the preservation of pluralism against the encroachments of the state, a state of exception must not be permitted to be determined by only one instance. According to him, to declare such a state, "it would be necessary not merely for a representative assembly to approve it, but also, say, a constitutional court. Such a 'state' would need to be precisely specified in

terms of the conditions under which it was appropriate, of the rights to be suspended and the capacities of state agencies that were thereby enhanced"[16]. Transferred to the Weimar scene, Hirst's proposal would certainly have been considered utopian by Schmitt.

Inasmuch as Schmitt's concerns focused on the modern sovereign European state and on issues revolving around the state, a state-centered political theory can be extrapolated from his legal and legally-related works, especially since the late 1910's.

To Schmitt the "state is the political unit of a people"[17]. Given Schmitt's anthropological understanding of the nature of man as basically dangerous, the *raison d'être* of the state, according to him, is to curb his aggressive nature by ensuring an orderly, peaceful, and stable societal order in the territorially-enclosed configuration called the state. This, in his view, should be attained by keeping the society depoliticized. Why? He argued that political tensions that accumulate within society have the potential of becoming so intense that conflict becomes a real possibility. Looking at this question in the context of Europe's political history since the sixteenth and seventeenth centuries, he maintained that as soon as the state's monopoly on politics was shattered by the emergence of domestic forces that began to question and even challenge the state's monopoly to decide on the enemy, one was forced to differentiate "politics" from "political"[18]. Accordingly, he defined both in terms of a criterion; namely, that of the distinction between friend and enemy. Whereas prior to the politicization of society it was the state that exercised the right to distinguish between friend and enemy in the international arena, with the politicization of society, the state, though still sufficiently powerful, could at any time be forced to do likewise in this domain as well. Said Schmitt: "The endeavor of a . . . state consists . . . in assurinng total peace within the state and its territory. . . . The state as the decisive political entity possesses . . . enormous power . . . "[19], that is, "of deciding in a concrete situation upon the enemy and the ability to fight him with the power emanating from the entity"[20].

Because the state is no abstraction, but a human construct, Schmitt inextricably linked it with a sovereign authority whose primary function is to guard the state's safety. To this end it is the guardian who is endowed with the authority to decide whether the state's safety is challenged and to act accordingly. Hence, Schmitt's celebrated definition that "sovereign is he who decides on the exception"[21]. Though the state precedes the constitution in Schmitt's configuration, the latter provides the framework within which

sovereign authority operates with several critical exceptions: Schmitt argued that no constitution can ever precisely circumscribe the situation, condition, or moment propelling the sovereign to declare an exception, nor can a constitution precisely prescribe the measures to be undertaken during an exception to restore order. Thus, in addition to endowing the sovereign authority with the monopoly to decide on the exception and on what had to be done to eliminate it, Schmitt logically concluded that because the exception is the antithesis of the norm, sovereign is also he "who definitively decides whether [the] normal situation actually exists"[22]. Because of the sovereign's independence from, and yet dependence on, the constitution, his rule during an exception can be characterized as what may appear to be a contradiction in terms, namely, constitutional dictatorship.

When Schmitt endowed the decisionist element in his sovereign authority in the early years of Weimar, he had in mind primarily the precarious predicament of the Weimar state and constitution. As is well known, what he endeavored to do in this situation was to provide answers to concrete problems facing the republic; in particular, on how best to strengthen the state in the face of the politically-antagonistic and centrifugal forces that plagued it. In short, although Schmitt acknowledged the interdependence of the state and the constitution, he interpreted the latter in a manner that would have strengthened the former. This need not suggest, however, that Schmitt would not have welcomed Weimar as a genuine state that contained a genuine society within which political parties that genuinely accepted the constitutional order would thrive; that is, parties that openly competed for power and once in power did not close the door and deny other parties what Schmitt (later in 1932) called an equal chance to attain power[23].

Basically skeptical of the viability of the Weimar constitution and hence of the Weimar state to survive in the face of onslaughts by a host of political parties and movements that ranged from outright hostility to lukewarm acceptance, Schmitt went beyond merely interpreting the constitution to strengthen the Weimar state by opting for constitutional revisions sometime in the future, revisions that would have addressed his fears. Though this topic is treated in the main part of the study, including his discussions about why he thought the constitution contained contradictions and flaws that needed to be harmonized, there are features in his treatment that need to be accented here.

A surprising feature that emerges as a by-product of a major constitutional thrust in Schmitt's endeavor to overcome the divisiveness of Weimar, is a reserve that he began to display toward his decisionism. What perhaps trou-

bled him was the possibility that however much a dictatorship may be circumscribed constitutionally, such rule can lead to the abuse of power and hence to the likelihood of social instability. This limitation came about as a result of Schmitt's postulating a society in which there would be two sources of legitimacy: in addition to the directly-elected sovereign there would be one based on deeply embedded institutions or concrete orders[24]. The concrete-order system that he envisioned and began to sketch toward the end of the republican period would have been rooted in, and developed largely according to, interests that included, for example, one embracing the agricultural domain, one consisting of professional civil servants, an order embracing the armed forces, and so on[25]. Each order, according to Schmitt, would be encouraged to develop a legal existence that reflected its particular institutional interest, and individuals in this societal configuration would be expected to realize themselves in the context of the order to which an individual naturally belonged[26]. Rid of Weimar's fractious parliament, the two legitimate pillars of society, Schmitt thought, would engage in a harmonious interplay, an interplay that would obviate the need of the sovereign to encroach on the self-regulating concrete orders[27].

In the midst of new crises that gripped Weimar, Schmitt ruled out constitutional revisions and implored President Hindenburg to take full advantage of Article 48 of the constitution to restore order, peace, and stability — preconditions for constitutional revisions[28]. He continued to embellish the nature of the state that he envisioned.

Severely disappointed by the failure of the sovereign authority to reestablish order, he characterized the Weimar state as weak, indecisive, and emasculated and attributed those deficiencies to the politicization of society, among other reasons. Such a state, in his view, was a "quantitative total state"[29] insofar as it quantitatively immersed itself in societal affairs, even becoming submerged by such affairs that culminate in the blurring of the distinction between the state and society. Consistent with his commitment to law and order, Schmitt's answer to the "quantitative total state" was the "qualitative total state," one sufficiently powerful to reaffirm its monopoly over politics with all that this implied, especially the ability to distinguish friend from enemy and act in accordance with that distinction as well as differentiate between the state and society. To keep society depoliticized, Schmitt, though he did not advocate thought control in the waning years of Weimar, did fear the consequences of what is now known as media politics. Hence, he insisted that no state, however liberal, could afford to leave the emerging technical means, namely, radio and film, capable of influencing the masses to just anyone[30].

As is well known, soon after Hitler's accession to power, Schmitt decided to participate in the new venture. In fact, he became very active, endeavoring to forge a constitutional order for the new system that he hoped would be acceptable even though it reflected his notions of a qualitative total state and of a depoliticized society based on concrete orders. He was initially convinced that on the basis of his reputation and in view of the fact that there was a constitutional void that needed to be filled, the Nazis would be foolish not to avail themselves of his abilities. Among things that Schmitt did not realize then was the significance that the new Nazi system attached to the idea of continuity with Weimar and, on the other hand, the significance it attached to the idea and the reality of the National Socialist party or movement dominating the state.

Despite the fact that Schmitt was so committed to his notion of the primacy of the state that he continued to believe in the validity of his analysis, he began to accommodate himself to the new thinking by sprinkling his writings with ideas propagated by the Nazis. However tangentially Nazi ideas are to the main thrust of his thinking, if the remarks that he injected in his works, such as demoting the state by characterizing it as "an organ of the Führer of the movement," reopening the gate to the politicization of society by echoing Nazi thinking that the totality must be permeated by the highly ideologized National Socialist thinking[31], and stating that the ideologically highly charged SS and SA could be integrated into the societal domain as concrete orders[32], are to be taken at face value, then, indeed, one can conclude that Schmitt left his vision of the state in shambles. That this was not the last word is attested by the fact that before the decade was out, Schmitt began to anticipate the demise of the Third Reich[33]. Because Nazi Germany failed to become the qualitative authoritarian state that Schmitt had espoused, and was instead turning into a quantitative, totalitarian, one-party state, he considered the entity that was rapidly emerging as containing the seeds of its own destruction[34].

Notes

[1] For a brief discussion of what transpired during the defense of the dissertation, see George Schwab, "Carl Schmitt: Through a Glass Darkly," *Eclectica*, 17, nos. 71–72 (1988), pp. 77–82.

[2] See George Schwab, "Progress of Schmitt Studies in the English-Speaking World," *Complexio Oppositorum: Über Carl Schmitt* (Edited by Helmut Quaritsch; Berlin: Duncker & Humblot, 1988), pp. 448–450, *passim*.

[3] See Joseph W. Bendersky's political biography titled *Carl Schmitt: Theorist for the Reich* (Princeton: Princeton University Press, 1983); Piet Tommissen, "Bausteine

zu einer Wissenschaftlichen Biographie (Periode: 1888–1933)," *Complexio Oppositorum, op. cit.*, pp. 71–100; Ernst Rudolf Huber, "Carl Schmitt in der Reichskrise der Weimarer Endzeit," *Ibid.*, pp. 33–50; George Schwab, "Carl Schmitt: Political Opportunist?" *Intellect*, 103, no. 2363 (February 1975), pp. 334–337.

[4] Here it is possible to mention only a few recent endeavors: Giovanni Sartori, "The Essence of the Political in Carl Schmitt," *Journal of Theoretical Politics*, 1, no. 1 (January 1989); Alexander Demandt, "Staatsform und Feindbild bei Carl Schmitt," *Der Staat*, 27, no. 1 (1988), pp. 23–32; Ernst-Wolfgang Böckenförde, "Der Begriff des Politischen als Schlüssel zum staatsrechtlichen Werk Carl Schmitts," *Complexio Oppositorum, op. cit.*, pp. 283–299; Christian Meier, "Zu Carl Schmitts Begriffsbildung — Das Politische und der Nomos," *Ibid.*, pp. 537–556; Joseph Kaiser, "Konkretes Ordnungsdenken," *Ibid.*, pp. 319–331; Julien Freund, "Der Partisan oder der kriegerische Friede," *Ibid.*, pp. 387–391; Jean-Louis Feuerbach, "La theorie du Grossraum chez Carl Schmitt," *Ibid.*, pp. 401–418.

[5] The relationship with Hobbes has been particularly stressed by, among others, Leo Strauss ("Comments on Carl Schmitt's *Der Begriff des Politischen*" [1932] in Carl Schmitt, *The Concept of the Political*, [Translation, Introduction, and Notes by George Schwab; New Brunswick, N.J.: Rutgers University Press, 1976], pp. 81–105), Helmut Rumpf (*Carl Schmitt und Thomas Hobbes — Ideelle Beziehungen und aktuelle Bedeutung mit einer Abhandlung über: Die Frühschriften Carl Schmitts* [Berlin: Duncker & Humblot, 1972]), and Heinrich Meier (*Carl Schmitt, Leo Strauss und "Der Begriff des Politischen": Zu einem Dialog unter Abwesenden* [Stuttgart: J. B. Metzlersche Verlagsbuchhandlung, 1988], especially pp. 19–96, 131–135). On Max Weber and Carl Schmitt, see G. L. Ulmen, "Politische Theologie und politische Ökonomie — Über Carl Schmitt und Max Weber," *Complexio Oppositorum, op. cit.*, pp. 341–365. With regard to Schmitt's influence on F. A. von Hayek, see F. R. Cristi, "Hayek and Schmitt on the Rule of Law," *Canadian Journal of Political Science*, 17, no. 3 (September 1984), pp. 521–535.

[6] Names that come to mind immediately include Reinhart Koselleck (see Keith Tribe's introduction to Koselleck's *Futures Past: On the Semantics of Historical Time* [Translated by Keith Tribe; Cambridge: The MIT Press, 1985], pp. viii-xv), Ernst-Wolfgang Böckenförde, Julien Freund, Paul Hirst, and Gianfranco Miglio.

[7] An inkling on the proliferation of Schmitt studies worldwide can be gathered from the following recently published works by, among others, Masanori Shiyake, "Zur Lage der Carl Schmitt-Forschung in Japan," *Complexio Oppositorum, op. cit.*, pp. 491–502; George Schwab, "Progress of Schmitt Studies in the English-Speaking World," *Ibid.*, pp. 447–459; Bongkun Kal, "Carl Schmitts Einfluss auf das koreanische Verfassungsleben," *ibid.*, especially pp. 505–507; David J. Levy, "The Relevance of Carl Schmitt," *The World and I* (March 1987), pp. 619–632; Manfred Baldus, "Carl Schmitt im Hexagon: Zur Schmitt-Rezeption in Frankreich," *Der Staat*, 26 no. 4 (1987), pp. 566–586; Michelle Nicoletti's review of "Carl Schmitt nella Stampa Periodica Italiana (1973–1986)" in *Telos*, no. 72 (Summer 1987), pp. 217–224; Ellen Kennedy, "Carl Schmitt in the West-German Perspective," *West European Politics*, no. 7 (1984), pp. 120–127; José María Beneyto, *Politische Theologie als politische Theorie: Eine Untersuchung zur Rechts- und Staatstheorie Carl Schmitts und zu ihrer Wirkung in Spanien* (Berlin: Duncker & Humblot, 1983); Alain de Benoist and Günter Maschke, "Bibliographie Carl Schmitt," *Nouvelle Ecole*, no. 44 (Spring 1987), pp. 67, *passim*; Piet Tommissen, "Zweite Fortset-

zungsliste der C.S.-Bibliographie vom Jahre 1959," *Cahiers Vilfredo Pareto: Revue européenne des sciences sociales*, 16, no. 44 (1978), pp. 193–238.

[8] As far as the English-speaking world is concerned, Guy Oakes has translated Schmitt's *Political Romanticism* (Cambridge: The MIT Press, 1985), Ellen Kennedy has translated Schmitt's *The Crisis of Parliamentary Democracy* (Cambridge: The MIT Press, 1985), and George Schwab has translated Schmitt's *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge: The MIT Press, 1985, 1988). Schwab's translation of Schmitt's *The Concept of the Political...*, appeared in 1976. Translations to appear in the near future include Schmitt's *Roman Catholicism and Political Form* by G. L. Ulmen and Schmitt's *The Leviathan in the Theory of State of Thomas Hobbes: Meaning and Failure of a Political Symbol* by George Schwab and Erna Hilfstein.

[9] Bendersky, *Carl Schmitt: Theorist for the Reich*, pp. 135–144.

[10] *Ibid.*, pp. 134, 135.

[11] Recently the intellectually-sophisticated and politically-left-inclined quarterly, *Telos* (published in New York), devoted a special issue to Schmitt titled, "Carl Schmitt: Enemy or Foe?" (no. 72). In the introduction the editors, Paul Piccone and G. L. Ulmen, observed that there is no reason why the left should "shrink from learning from its opponents" (p. 3). Speaking specifically of Schmitt, they state that some of his "ideas throw much needed light on questions central to the so-called crisis of the left — questions which, unless answered soon, will only lead to the further decline of an already rapidly falling movement" (p. 3). See also Helmut Quaritsch's forthcoming review of this issue of *Telos* in *Der Staat*, 27, no. 3 (1988). On Schmitt and the political left see also Volker Neumann, "Die Wirklichkeit im Lichte der Idee," *Complexio Oppositorum*, *op. cit.*, pp. 557–575.

[12] Ellen Kennedy, "Carl Schmitt and the Frankfurt School," *Telos*, no. 71 (Spring 1987), pp. 42, *passim*. For additional discussions of the Frankfurt School's debt to Carl Schmitt, see Ellen Kennedy, "Carl Schmitt and the Frankfurt School: A Rejoinder," *Telos*, no. 73 (Fall 1987), pp. 101, *passim*; Jeffrey Herf, Paul Piccone, and G. L. Ulmen, "Reading and Misreading Schmitt, *Telos*, no. 74 (Winter 1978/88), pp. 133–140; Keith Tribe, ed., *Social Democracy and the Rule of Law: Otto Kirchheimer and Franz Neumann* (Translated by Leena Tanner and Keith Tribe; London: Allen & Unwin, 1987), p. 9, *passim*; Keith Tribe, "Franz Neumann in der Emigration: 1933–1942," *Die Frankfurter Schule und die Folgen* (Edited by Axel Honneth and Albrecht Wellmer; Berlin, New York: Walter de Gruyter, 1986), pp. 263–269; Rainer Erd, ed., *Reform und Resignation: Gespräche über Franz L. Neumann* (Frankfurt a/M.: Suhrkamp, 1985), pp. 46–53, *passim*; Alfons Söllner, "Leftist Students of the Conservative Revolution: Neumann, Kirchheimer, and Marcuse," *Telos*, no. 61 (Fall 1984), pp. 55–70; Norbert Bolz, "Charisma und Souveränität: Carl Schmitt und Walter Benjamin im Schatten Max Webers," *Religionstheorie und Politische Theologie: Der Fürst dieser Welt—Carl Schmitt und die Folgen* (Edited by Jacob Taubes; Munich: Wilhelm Fink Verlag, Verlag Ferdinand Schoningh, 1983), vol. 1, pp. 249–262; George Schwab, "Legality and Illegality as Instruments of Revolutionaries in Their Quest for Power: Remarks Occasioned by the Outlook of Herbert Marcuse," *Interpretation*, 7, no. 1 (January 1978), p. 89, n. 46.

[13] Ellen Kennedy, "Carl Schmitt und die 'Frankfurter Schule,' " *Geschichte und Gesellschaft*, 12, no. 3 (1986), p. 386, *passim*.

[14] In addition to Nicoletti's discussion of the reception of Schmitt by the left in

Italy (see above, note 7), see also Franco Ferrarotti's introduction to George Schwab's *Carl Schmitt: Lasfida dell'eccezione* (Rome: Laterza, 1986), pp. viii-xx.

[15] Paul Hirst, *Law, Socialism and Democracy* (London and Boston: Allen & Unwin, 1986), p. 106.

[16] *Ibid.*, p. 103.

[17] Carl Schmitt, *Verfassungslehre* (6th ed.; Berlin: Duncker & Humblot, 1970), pp. 3, 125.

[18] Schmitt, *The Concept of the Political...*, pp. 12–13.

[19] *Ibid.*, p. 46. In addition to having thoroughly discussed Schmitt's notion of the state in *The Challenge of the Exception*, I have treated aspects of this theory in my introduction to *The Concept of the Political*, especially pp. 6–16, as well as in my introduction to *Political Theology...*, especially, pp. xv-xix, xxiv-xxvi. For an informative discussion of the centrality of the political in the configuration of the state, see Ernst-Wolfgang Böckenförde, "Der Begriff des Politischen als Schlüssel zum Staatsrechtlichen Werk Carl Schmitts," *Complexio Oppositorum, op. cit.*, pp. 283–299.

[20] Schmitt, *The Concept of the Political...*, p. 45.

[21] Schmitt, *Political Theology...*, p. 5. On the relevance of Schmitt's decisionism, see Paul Hirst's "Carl Schmitt's Decisionism" in *Telos*, no. 72 (Summer 1987), pp. 15–26. For a discussion of some contradictory components that Schmitt embraced in his decisionism, see the discussion by Günter Maschke titled, "Die zweideutigkeit der 'Entscheidung' — Thomas Hobbes und Juan Donoso Cortés im Werk Carl Schmitts," *Complexio Oppositorum,, op. cit.*, pp. 193–232.

[22] Schmitt, *Political Theology...*, p. 13.

[23] Carl Schmitt, *Legalität und Legitimität* (4th ed.; Berlin: Duncker & Humblot, 1988), pp. 30–40.

[24] Schmitt, *Verfassungslehre...*, pp. 170–173.

[25] Carl Schmitt, "Freiheitsrechte und institutionelle Garantien der Reichsverfassung," (1931), *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954: Materialien zu einer Verfassungslehre* (3rd. ed.; Berlin: Duncker & Humblot, 1985), pp. 140–173.

[26] Carl Schmitt, "Wohlerworbene Beamtenrechte und Gehaltskürzungen," (1931), *Ibid.*, pp. 174–180.

[27] Carl Schmitt, "Starker Staat und gesunde Wirtschaft" (1932), *Volk und Reich*, no. 2 (1933), pp. 91ff.

[28] Carl Schmitt, "Die staatsrechtliche Bedeutung der Notverordnung" (1931), *Verfassungsrechtliche Aufsätze..., op. cit.*, pp. 257–260, *passim.*

[29] Schmitt, *Legalität und Legitimität*, p. 96; Carl Schmitt, *Der Hüter der Verfassung* (3rd ed.; Berlin: Duncker & Humblot, 1985), pp. 79–91; Carl Schmitt, "Weiterentwicklung des totalen Staats in Deutschland" (1933), *Verfassungsrechtliche Aufsätze..., op. cit.*, pp. 360–362. On how Schmitt came to the term "total" see also "J. P. Faye's critiek van de narratieve economie," *Eclectica*, 13, nos. 55–57 (1984), pp. 52–54.

[30] Carl Schmitt, "Weiterentwicklung des totalen Staats in Deutschland," *Verfassungsrechtliche Aufsätze..., op. cit.*, pp. 360–362.

[31] Carl Schmitt, *Über die drei Arten des Rechtswissenschaftlichen Denkens* (Hamburg: Hanseatische Verlagsanstalt, 1934), pp. 63, 65, 66–67.

[32] Carl Schmitt, *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (3rd ed.; Hamburg: Hanseatische Verlagsanstalt, 1935), pp. 19–21, 33.

[33] This becomes clear in Carl Schmitt's *Der Leviathan in der Staatslehre des Thomas Hobbes: Sinn und Fehlschlag eines politischen Symbols* (Hamburg: Hanseatische Verlagsanstalt, 1938). It is my intention to treat this topic in the English translation of the work (forthcoming).

[34] *Ibid.*

THE CHALLENGE OF THE EXCEPTION

In Memory
of my Parents and Brother

Preface

"The Challenge of the Exception" was chosen as a title because it embodies many of the ideas Carl Schmitt developed in his major writings during the Weimar period. He was greatly concerned with the problem of the state of exception. For the purpose of this study a state of exception may be temporarily called, in a broad sense, any type of severe economic or political disturbance that requires the application of extraordinary measures, and for which the constitution makes provisions. Legally it usually means the temporary, partial or total suspension of ordinary and constitutional laws by the president to restore order. The state of exception in a specific sense presupposes a constitutional order, while the state of emergency is a general category without specific reference to an existing order, because *necessitas non habet legem.*

Since Schmitt was concerned with a number of legal problems and the way they specifically referred to crises in Weimar, the question-answer method is especially appropriate and is, therefore, employed as much as possible. In other words, specific questions which Schmitt had in mind pertaining to concrete problems and his answers to these questions will be pointed out. Due to Schmitt's concern for particular legal situations no answers to universal philosophical questions will be forthcoming. However, it must be noted that Schmitt at times had difficulty keeping legal questions apart from certain political ideas and from his Catholic heritage. As a result of a link between the three, there emerges a definite political model of the state he envisioned for Germany.

This study is concerned mainly with the political ideas inherent in Schmitt's writings. In the course of the investigation the two questions answered are: (1) were the ideas developed by Schmitt between 1921 and 1933 in harmony with the Weimar constitution, or were they hostile to its republican spirit, and (2) to what extent did Schmitt's ideas between 1933 and 1936 reflect Nazi ideology? The sixteen year period between 1921 and 1936 has not been chosen arbitrarily. It coincides with some of his major writings. Because of an attack on him in 1936 by the Gestapo newspaper, *Das Schwarze Korps,* he ceased writing on problems pertaining to jurisprudence and politics (with few

exceptions) until the end of World War II. Despite this attack, Schmitt continued to write on questions relating to international law and theory.

The chronological approach utilized in this study is required for two major reasons: (1) his ideas should not be separated from specific constitutional events that were fraught with political overtones and that occurred during these sixteen years, and (2) a chronological treatment makes it possible to study his convictions in the very fluid historical atmosphere that prevailed in Germany during this period.

While preparing this study I have tried to bear one point in mind, namely, that since most of Schmitt's writings are not available in English, this study may serve as an introduction to some of his main ideas — those that are discussed the most and that have decisively determined his reputation. Assuming that the reader is acquainted with the general course of German history between 1921 and 1936, I have avoided duplicating what others have already said. However, references to important works on this period are mentioned throughout the study.

In the course of preparing this manuscript I have had the benefit of valuable comments from a number of people. Professor Schmitt's interest in my study has resulted in many hours of fruitful discussion with him. I am very grateful for the suggestions made by the late Professor Gottfried Salomon Delatour of Frankfurt a/M. Mrs. Edythe Lutzker, M. A., has seen this study grow, and her comments have been invaluable. But, of course, the responsibility for anything written here rests entirely upon me. Finally I must thank my wife, Eleonora, for the patience and understanding she has had while I prepared this manuscript for publication.

George Schwab

The City College of the
City University of New York
November 1968

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Abbreviations

The following abbreviations are used in footnote references to Schmitt's major publications between 1921 and 1936.

D = Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf (1921, 1928, 1964). All references in this study are to the first two editions.

PT = Politische Theologie: Vier Kapitel zur Lehre von der Souveränität (1922, 1934). All references in this study are to the second edition.

GGL = Die geistesgeschichtliche Lage des heutigen Parlamentarismus (1923, 1926, 1961, 1969). All references in this study are to the first two editions.

RK = Römischer Katholizismus und politische Form (1923, 1925). References in this study are to both editions.

VV = Volksentscheid und Volksbegehren: Ein Beitrag zur Auslegung der Weimarer Verfassung und zur Lehre von der unmittelbaren Demokratie (1927).

BP = Begriff des Politischen (1927, 1932, 1933, 1963). Most references in this study are to the second edition.

V = Verfassungslehre (1928, 1954, 1957, 1965). All references in this study are to the third edition.

HV = Der Hüter der Verfassung (1931, 1969). All references are to the first edition.

LL = Legalität und Legitimität (1932, 1968). All references are to the first edition.

SBV = Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit (1933, 1935). All references in this study are to the third edition.

DA = Über die drei Arten des rechtswissenschaftlichen Denkens (1934).

SZR = Staatsgefüge und Zusammenbruch des zweiten Reiches: Der Sieg des Bürgers über den Soldaten (1934).

The Introduction to the second edition of *GGL* is new. The second edition of *BP* has been considerably expanded (the Foreword and the three Corollaries of the 1963 edition are new).

Introduction

1. Biographical Sketch

Born on July 11, 1888, in the predominantly Protestant town of Plettenberg in Westphalia, Carl Schmitt was the oldest of four children. His parents, Johann and Louise (born Steinlein) Schmitt, were devout Catholics who came originally from the county of Trier — Moselle. It was his mother's hope that young Carl would take advantage of two endowments set aside for those members of her family preparing for the Catholic priesthood.

With this in mind Carl was sent to a Catholic primary school in Plettenberg, and, from 1900 to 1907, to the humanistic gymnasium of Attendorn, also in Westphalia. While attending high school he lived in a Catholic convent. During these years he received a thorough training in the humanities, religion and Greek.

Upon graduation from the gymnasium in 1907, Carl entered the University of Berlin and — instead of majoring in theology — with his parents' consent, studied law. There he remained until the summer of 1908, whereupon he registered for the summer session at the University of Strassburg, and remained here until his graduation in 1910. From this institution he received his doctorate in jurisprudence *(summa cum laude)*. His dissertation dealt with criminal law and the title of his thesis was: *Über Schuld und Schuldarten: Eine terminologische Untersuchung*.

Schmitt passed his first law *(Referendar)* examination in 1910. Soon after he began working as a law clerk and made the usual advances in his field. In 1913 Schmitt met the barrister and deputy of the Center party, Dr. Hugo am Zehnhoff[1]. He exerted a profound influence on Schmitt's juristic outlook by stimulating his interest along lines of concrete order and procedure. Prior to this encounter Schmitt had found sufficient the normativist method of subsuming each legal case to an existing norm. Now Schmitt views his writings prior to 1914 as stylistic exercises.

[1] Prussian Minister of Justice from 1919 until 1927.

In some of these writings he followed the general Neo-Kantian construction of the state. Schmitt believed the state's function to be the realization of right *(Recht)*[2]. Right precedes the state[3]. And who determines right? Since the Catholic church is the universal spiritual entity which does not recognize an equal it is, Schmitt believed, in a much better position to decide what constitutes right than the very many states which are essentially *pares inter pares*, and also victims of time in history[4]. What is the role of the individual? Schmitt integrated the individual into the rhythm of the state[5]. Thus the order of precedence: right, state and the individual[6]. Schmitt refuted Neo-Kantianism and normativism in the 1920's and 1930's in favor of decisionism. Precise hints of the latter had already appeared in 1912. He pointed out then that the interpretation and application of a specific law depends on the decision of a judge and not on another law[7].

Schmitt took his second and final law *(Assessor)* examination in 1915. In February of the same year he volunteered for the infantry. While in basic training he sustained a serious vertebra injury which incapacitated him from front line duties. Because of this injury he was transferred in the summer of 1915 to the state-of-war section of the general staff *(Stellvertretende Generalkommando)* in Munich. In general, this section was empowered to supervise, administer and issue decrees over all civil authorities in the area of upper Bavaria. Under the jurisdiction of the section to which Schmitt was attached were included the tasks of combatting black market activities, of rationing food and clothing, and later in the war, of countering enemy propaganda.

While working in this section Schmitt began to be interested in the question of dictatorship, the state of exception and similar problems. It was at this time that Schmitt observed the difference between the state of war (as it was called in Bavaria) or the state of siege (as it was called in Prussia) and a dictatorship.

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[2] Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen* (Tübingen: Verlag von J. C. B. Mohr [Paul Siebeck], 1914), p. 2.

[3] *Ibid.*, p. 46.

[4] *Ibid.*, pp. 44—45.

[5] *Ibid.*, p. 94.

[6] *Ibid.*, p. 2.

[7] Carl Schmitt, *Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxis* (Berlin: Otto Liebmann, 1912), pp. 48, 52, 104, 106.

> In a state-of-war situation the preservation of the separation between legislation and execution is maintained, [but] a concentration within the executive takes place; in a dictatorship the distinction between legislation and execution remains too, but the division is done away with in that the same place, [the executive], has in its hand the decree [power] of the laws and their execution[8].

During his service in Munich Schmitt received a three month leave of absence so that he could obtain formal admission as a university lecturer, and for three months in 1916 he lectured at the University of Strassburg. After the leave of absence expired he returned to his post in Munich where he remained until the end of the war. Soon after the conflict, in 1919, he accepted a lectureship at the Graduate School of Business Administration *(Handelshochschule)* in Munich where he taught until 1921. In the same year he was appointed full professor of public law and government at the University of Greifswald. Between 1922 and 1928 he held a chair at the University of Bonn, and while there he married in 1926 Duschka Todorovitsch who was of Orthodox Serbian descent[9]. Their only child, a daughter, Anima, was born in Berlin five years later.

From 1919 until 1928 Schmitt lived the regular life of a professor, lecturing and writing. In 1928 he moved from Bonn to Berlin where he accepted the Hugo Preuss chair at the Graduate School of Business Administration. The Wall Street crash of 1929 ushered in the last phase of Weimar's existence, and Schmitt, who was now in close contact with Johannes Popitz, Secretary of State in the Ministry of Finance, and Reichswehr officers of the Schleicher entourage, such as Majors Erich Marcks and Eugen Ott, attempted through his writings to forestall an extremist party slide into power. Regarding the action of the Reich versus Prussia on July 20, 1932 (the removal of the Prussian Cabinet by the Reichspresident on the basis of Article 48), Schmitt was called on, at Schleicher's request, to become legal adviser, together with Professors C. Bilfinger, E. Jacobi and Dr. Hoche, to prepare and help defend the case of Prussia vs. the Reich before the German Supreme Court at Leipzig. The speaker for the Reich was *Ministerialdirektor* Gottheiner of the Reich's Ministry of Interior. Those who defended Prussia were headed by *Ministerialdirektor* A. Brecht of the Prussian

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[8] Carl Schmitt, "Diktatur und Belagerungszustand," *Zeitschrift für die gesamte Strafrechtswissenschaft,* XXXVIII, (1917), p. 156.

[9] His previous marriage which took place in 1916 was annulled in 1924.

Ministry of Interior. Legal experts were, among others, G. Anschütz, H. Heller and H. Nawiasky[10]. As one of the legal experts for the Reich (in this capacity he could not make binding declarations) Schmitt had implicitly supported Schleicher's immediate aim of preventing a possible outbreak of civil war which, Schmitt believed, could have subsequently resulted in a victory for the radicals[11]. Chancellor Papen's aim, on the other hand, was a conservative constitutional reform along authoritarian lines[12] which he had hoped to implement by declaring a state of exception.

In 1932 Schmitt accepted a chair of public law at the University of Koeln where he lectured during the summer of 1933. Also in July 1933 he was nominated for the office of Prussian Councillor of State. Although the Prussian Council of State did not meet after 1936, he retained his title until 1945[13]. Upon returning to Berlin, in the autumn of 1933, he was nominated to occupy a chair at the University of Berlin which he held until the end of World War II.

After the Reichstag had voted for the enabling act, on March 23, 1933, Schmitt reflected upon the idea of joining the National-Socialist party.

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[10] The other legal experts in the judicial proceedings for Prussia were Dr. Badt, Professors F. Giese, H. Peters, T. Maunz, Fecht and Mr. von Jan and Walz. *Preussen contra Reich vor dem Staatsgerichtshof: Stenogrammbericht der Verhandlungen vor dem Staatsgerichtshof* (Berlin: J. H. W. Dietz Nachf., G.m.b.H., 1933), p. 3.

[11] See Karl Dietrich Bracher, *Die Auflösung der Weimarer Republik* (3rd ed.; Stuttgart: Ring-Verlag, 1960), p. 590. According to Brüning, Schleicher's immediate aim was to hinder the National Socialists from utilizing their strength in the Prussian parliament to gain control of the Prussian police. "Letter to Rudolf Pechel," *Deutsche Rundschau,* Heft 7, July 1947, p. 13. It may be of interest to note that the *Tägliche Rundschau,* the only paper at Schleicher's disposal, printed an excerpt from Schmitt's *Legalität und Legitimität* (Berlin: Duncker & Humblot, 1932. Hereafter: *LL.)* on July 19, 1932, dealing with the premiums of power (see V, 2). The paper noted that to give the National Socialists a majority in the forthcoming election of July 31 would have unforeseeable consequences. Among other points, the paper emphasized that the Nazis would "change the constitution, introduce a national religion *(Staatskirchentum),* dissolve the unions, etc." Whoever voted for National Socialism, the paper maintained, would "sell Germany out entirely to this group." In his *Legalität und Legitimität* (p. 51) Schmitt explicitly referred to the National Socialists, among others, as constituting a danger to the presidial system.

[12] Bracher, *Die Auflösung . . .*, p. 593.

[13] Carl Schmitt, "Answers in Nuremberg," *Personal Papers,* II, April 28, 1947, p. 3.

He felt that, among other things, the act was passed to avert the Communist menace, to put an end to unemployment and hence, to insure peace; but most important was Weimar's suicide. Moreover, after the enabling act was passed, he had the impression that the new system offered vast possibilities for work and reorganization. Accordingly, he joined the party on May 1, 1933, and his membership number, because of his late arrival, was above the two million mark[14].

Shortly after the Reichstag had passed the enabling act Schmitt participated in the drafting of the *Reichsstatthalter* law of April 7 and, as a member of the Prussian Council of State, in the drafting of the Prussian communal law of December 1933. During this fateful year he was appointed to head the professional group of university professors in the National-Socialist Jurists' Association. He withdrew from this post in November 1936, approximately one month before the bitter attack launched against him on December 10 in the well known Gestapo weekly, *Das Schwarze Korps*[15]. From then on Schmitt's situation in Germany became in some respects as precarious as that of the hero of Herman Melville's *Benito Cereno*[16].

Although after these vociferous attacks Schmitt continued lecturing until Germany's collapse, he ceased to write, with a few exceptions, on juristic and related questions. At the beginning of April 1939 he expounded his *Grossraum* idea which he construed as an inevitable intermediate step between the traditional national state and one-world universalism. This idea was modeled on the Monroe Doctrine, and it treated the Western hemisphere as the first example of a *Grossraum*[17].

When Berlin fell, in April 1945, Schmitt was arrested by the Russians and released after an interrogation which lasted for several hours. In September 1945 he was interned in Berlin by the Americans and spent more than one year in two American internment camps. Subsequently, in March 1947, Schmitt was transferred to Nuremberg where he was held for two months as a witness and possible defendant. He was never

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[14] *Ibid.* He received his membership book early in 1937.

[15] *Ibid.*, pp. 3—5. See IX, 2.

[16] Carl Schmitt, "Antwortende Bemerkungen zu einem Rundfunkvortrag von Karl Mannheim," *Ex Captivitate Salus: Erfahrungen der Zeit 1945/1947* (Köln: Greven Verlag, 1950), pp. 21—22. See also: Ernst Jünger, *Strahlungen* (Tübingen: Heliopolis-Verlag, 1949), pp. 57, 408.

[17] Schmitt's writings on questions pertaining to international law and theory deserve separate treatment.

accused at Nuremberg or thereafter. As soon as he was released in May 1947, he did not return to Berlin but went back to Plettenberg, and he has remained there since. His wife died, after a prolonged illness in 1950; and his only child, Anima, in 1957, married a professor of the history of law at the University of Santiago, Spain. When he was seventy, a number of articles dealing with constitutional law and questions pertaining to political theory were dedicated to him by his friends and disciples[18]. A two volume *Festschrift* was presented to him for his eightieth birthday[19].

2. Intellectual Heritage

To write about the intellectual heritage of an individual whose people have not only lost two world wars, but who in his youth, at least until 1914, was under the influence of diverse social and political currents, i. e., idealism, revolution, liberal democracy, Prussian victories, *Kulturkampf*, socialism, etc., is one of the most interesting but also one of the hardest tasks to accomplish. The opposing intellectual forces in Germany were numerous. The battle between soul and intellectual spirit[20] or reason is one of the topics which still plagues German intellectual life. After World War I intellectual attempts to justify national revenge, inhumanity, violence and anti-Semitism were another aspect of the German scene. It is also no accident that Otto Weininger has been read intensely by many of the older German intellectuals, not so much, as is commonly believed, because of his hatred of Jews (he converted from Judaism to Christianity), but as a revealing reflection of their own self-hatred. These are but a few of the curious elements involved.

Few Germans who have had any connection with the German centers of learning within the last sixty years have been able to escape

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[18] *Festschrift für Carl Schmitt* (Edited by Hans Barion, Ernst Forsthoff and Werner Weber; Berlin: Duncker & Humblot, 1959).

[19] *Epirrhosis: Festgabe für Carl Schmitt* (Edited by Hans Barion, Ernst-Wolfgang Böckenförde, Ernst Forsthoff and Werner Weber; Berlin: Duncker & Humblot, 1968), two volumes.

[20] Some Germans claim that after Hegel's death the carriers of the intellectual spirit in Germany were Jews with whom, they felt, they could not compete. The German reaction was to take refuge in the soul. The soul finally felt compelled to defend itself against the onslaught of the intellect by erecting gas chambers. See Kurt Hiller, "Kameradschaftliche Note" (1948), *Köpfe und Tröpfe* (Hamburg: Rowohlt, 1950), p. 367.

the above mentioned dilemmas. It is not my task to describe these situations in detail since I am not writing an intellectual history of Germany, but I am only pointing out the prevailing intellectual climate of which Schmitt was a part. Here will be mentioned only those influences that have a direct bearing on his works and, hence, on this study.

Note has already been made of Schmitt's Catholic provenience. Throughout his early years Schmitt had great admiration for the Catholic church. As a grandnephew of three Catholic clergymen who were involved in the *Kulturkampf* (1872—1887), and as a Catholic living in a predominantly Protestant area, he was very conscious of the *Kulturkampf* controversy. Although over by the time he was born, it was still a hotly debated topic, and often led to violence between Catholics and Protestants. Young Carl was fascinated by the victory of the Catholic church over Bismarck. "Der grosse Bismarck," he was fond of saying, "war von der katholischen Kirche besiegt worden."

He also admired the church's stability and juristic perfection. In commenting on the church's influence on the political theory of the modern state, one of his typical remarks was: "Alle prägnanten Begriffe der modernen Staatslehre sind säkularisierte *theologische* Begriffe[21]." Furthermore, Schmitt was also struck by the church's flexibility which, he felt, manifested itself in its ability to unite with the most diverse political systems without losing its own major characteristics. He called this elasticity the church's *complexio oppositorum*[22]. However, his admiration for the splendor of the Catholic church was an early occurrence, for by 1929 he was convinced that theology, instead of offering a firm foundation for political theories, opened more avenues of dispute and distinctions than any other discipline; so much so that a layman concerned with the theory of dictatorship — as the religious Donoso Cortés — saw himself entangled in scholastic controversies in which the theologian was naturally superior to the layman[23].

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[21] Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (2nd ed.; München: Duncker & Humblot, 1934), p. 49. Italics mine. Hereafter: *PT*.

[22] Carl Schmitt, *Römischer Katholizismus und politische Form* (2nd ed.; München: Theatiner Verlag, 1925), p. 10. Hereafter: *RK*.

[23] Carl Schmitt, "Der unbekannte Donoso Cortés" (1929), *Positionen und Begriffe im Kampf mit Weimar — Genf — Versailles 1923—1939* (Hamburg: Hanseatische Verlagsanstalt, 1940), p. 116.

Schmitt's disillusion with the Catholic church was final after World War II. Because the church was habitually meddling in affairs which was of no concern to it, and because of the religious wars which were incited by theologians in the sixteenth and seventeenth century[24], Schmitt began to echo Albericus Gentilis' remark: *Silete, theologi, in munere alieno*[25]*!*

Despite Schmitt's Catholic provenience, his writings remained immune to the essentially non-historical natural law concept which has formed a cornerstone of scholastic thought since its inception. Whatever natural law may mean, one of its aspects is clear, namely, that natural law, on the one hand, and Schmitt's sense of the concrete and of the uniqueness of historical situations on the other, are incompatible.

One basic principle of natural law has been the belief that all men are equal. This may be interpreted from several points of view: for example, the equality of all men before God, the equality of all civilized men, and finally the equality of all citizens of a particular nation. Are they all equally good or equally evil? Yet these nuances do not invalidate the basic norm, namely, that of the equality of all men. Moreover, natural law thinkers have generally assumed that this equality is self-evident and therefore not subject to change in the course of history. If, however, the concrete situation has meaning in itself, as it does for Schmitt, then the conclusion to be drawn is that eternal values, for example the equality of all men, are nonexistent, which, in turn, must be followed by the proposition that an historical truth is true only once (in the sense of a momentary and not eternal truth), a maxim which Schmitt strongly believes and to which we will return in due time.

Catholic writers who exerted a considerable influence on Schmitt are Bonald, de Maistre and the long forgotten Spaniard Donoso Cortés — all non-German nineteenth-century philosophers of the counterrevolution. Bonald, believing that man is essentially evil and that he is too weak to recognize truth, sees the only solution in tradition and society[26]. De Maistre, too has no illusion about the nature of man, and he also

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[24] Carl Schmitt, "Ex Captivitate Salus," *Ex Captivitate Salus . . .*, p. 75.

[25] *Ibid.*, p. 70; also: Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Köln: Greven Verlag, 1950), pp. 96, 131.

[26] *PT*, pp. 70 ff.

finds his solution in tradition. Yet the special debt that Schmitt owes to de Maistre is his equation of decisionism with sovereignty.

> De Maistre speaks with special predilection of sovereignty which means to him essentially decision. The value of the state lies in that it [is capable of making a] decision, the value of the church, that it is last unappealable decision ... and the infallibility of the spiritual order is identical with the sovereignty of the state's order: the two words infallibility and sovereignty are 'parfaitement synonymes'[27].

Donoso Cortés' primary political aim was to form a conservative front of European powers against the revolutionary forces which erupted in 1848[28]. Atheist anarchist socialism with its axiom that man is good contradicted sharply Cortés' religious conviction that man is not only bad, but also disgusting unless redeemed by Christ[29]. Moreover, according to Schmitt, Donoso Cortés also despised the bourgeoisie whom he defined as "'una clasa discutidora.'" Discussion is diametrically opposed to dictatorship[30]. Therefore, in an age when monarchy was rapidly coming to an end, Donoso Cortés, said Schmitt, saw no alternative to socialist anarchism and bourgeois liberalism but political dictatorship. The novelty in Donoso Cortés' thought was that he no longer advanced legitimist arguments, i. e., a restoration philosophy[31].

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[27] *Ibid.*, p. 71.

[28] Carl Schmitt, "Donoso Cortés in Berlin, 1849," (1927), *Positionen und Begriffe ...*, pp. 83—84.

[29] Carl Schmitt, "Der unbekannte Donoso Cortés" (1929), *Positionen und Begriffe ...*, p. 117.

[30] Carl Schmitt, *Donoso Cortés in gesamteuropäischer Interpretation* (Köln: Greven Verlag, 1950), pp. 30. 34, 36.

[31] Carl Schmitt, "Der unbekannte Donoso Cortés," pp. 118—119. Schmitt stated in 1950 that the central question in the days of Cortés was the problem of authority versus anarchy. The same holds true for the Weimar period. But now, according to Schmitt, the opposing concepts of authority and anarchy have lost their former acuteness, and a new pair of opposites has come to the fore, namely, anarchy and nihilism. Although Schmitt did not treat this question at length, he implied that the nihilism of a centralized order which became possible with the aid of modern means of destruction is opposed by a despairing people who see in anarchy not only a lesser evil, but even a welcome relief (see Carl Schmitt's *Donoso Cortés in gesamteuropäischer Interpretation*, pp. 9—10). This allusion is obviously intended to describe the situation in Hitler's Germany during World War II, when the people would have been content to live in a "state of nature" rather than be subjected to Hitler's tyranny. Although Schmitt's distinction is interesting, no conclusive evidence

Schmitt inherited from these Catholic philosophers of the counter-revolution a critical estimate of the nature of man. According to Schmitt's earlier writings, he believed that man is basically evil because of original sin. Subsequently he noted the relationship between the theological outlook of man's nature and Hobbes' presupposition that man is basically dangerous[32]. Schmitt observed that many modifications and variations of the anthropological meaning of evil exists. It can be understood as corruption, weakness, fear, stupidity, irrationality, etc.[33].

Schmitt's outlook on the nature of man and his emphasis on the necessity of the people being led contradicts one of the tenets of liberal political philosophy. But whereas Bonald and de Maistre found their solution in tradition, Schmitt finally came to the conclusion that in so far as Weimar Germany was concerned, the solution to the ever re-curring crises lay in the establishment of a plebiscitarian type of democracy with the president of the Weimar state at the helm, aided by the army and the officialdom.

By the time Schmitt had discovered Donoso Cortés he had already published a long article on dictatorship[34]. Schmitt's theoretical solution was, to an extent, a variation on Donoso Cortés' theme of political dictatorship. The question of legitimacy in the dynastic sense did not enter Schmitt's mind. He did adhere to some extent to the concept of democratic legitimacy (i. e., the German people's decision on the nature of the constitution they desired to live under) in so far as the Weimar constitution was concerned. But even here his adherence was qualified by not allowing the people to participate in political decision making unless asked to do so by the president.

Similarities also exist between Cortés' condemnation of freedom of discussion in the assemblies in Prussia and other parts of Germany after the upheavals of 1848, and Schmitt's criticisms of the Weimar parliament. It must be pointed out, however, that Cortés was not against the institution of parliament as such. The conditions of his acceptance of parliament were that it be "subordinate to the monarch and united with the monarch in seeking the solutions necessary for the

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has appeared so far that the German people were discontent with Hitler at any time during the conflict.

[32] Carl Schmitt, *Der Begriff des Politischen* (2nd ed.; München: Duncker & Humblot, 1932), pp. 49—52. Hereafter: *BP.*

[33] *Ibid.*, p. 46.

[34] Carl Schmitt, "Diktatur und Belagerungszustand."

welfare of society[35]". Schmitt's opinion of the Weimar parliament was very similar. Moreover, we will also find in Schmitt's writings a striking similarity with Cortés' evaluation of political parties. The latter believed that groups and parties in assemblies "were less interested in uniting with legitimate authority for action than they were in maintaining a doctrinal position which they maneuvered to turn into a position of dominance of the state"[36].

In his attempts to define himself intellectually Schmitt also dealt with romanticism. He wrote a major study on political romanticsm in 1919[37]. For him to have done this was a kind of "skin-shedding," or what the Germans now call *Entlastung*, because the romantic tradition has had a profound influence on the German intellectual outlook. By "shedding his skin" Schmitt aimed at standing apart from the romantics. This he was able to achieve when he confronted Catholicism with the former. He observed that neither the Catholic religion nor Catholic institutions, nor Catholicism in general are in themselves romantic, despite the fact that they have often been utilized as incitements to romantic enthusiasm[38].

H. S. Reiss has noted that the earliest phase of romanticism was preeminently English. He stated that the English romantics prior to the French Revolution "held liberal and even revolutionary views, which they abandoned in the years following the Revolution". The second phase was mainly German and, according to Reiss, the German romantics "reacted violently, after a short spell of enthusiasm, against the Revolution and its Napoleonic aftermath". The French phase of romanticism was, Reiss added, partly reactionary but it also had a radical side. Above all, it was marked by a strong interest in social problems and an inclination towards nationalism[39].

Striking in this description is the basic lack of conviction on any given object. Romanticism in various countries had different aims and even within a given country romantics can be found embracing a wide

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35 J. J. Kennedy, *Donoso Cortés as Servant of the State* (New York: Unpublished Ph. D. Dissertation, Columbia University, 1954), pp. 130—131.

36 *Ibid.*, p. 131.

37 Carl Schmitt, *Politische Romantik* (2nd ed.; München: Duncker & Humblot, 1925).

38 *Ibid.*, p. 76.

39 Hans Siegbert Reiss, ed., *The Political Thought of the German Romantics 1793—1815* (Oxford: Basil Blackwell, 1955), p. 1.

variety of beliefs. In speaking of German political romanticism in particular, Schmitt singled out the case of Adam Müller. His political activities, according to Schmitt, were indicative of the rootlessness of the German political romantics.

Schmitt pointed out that Adam Müller was an opportunist when he advocated ideas that were favorable to the Prussian government, because simultaneously he was ready to denounce them. Moreover, Müller's roaming from the Prussian civil service to the post of Austrian consul-general in Leipzig was, in Schmitt's view, symptomatic of the restlessness and rootlessness of romantics in general. The picture of instability was completed when the latter two qualities, according to Schmitt, were combined with Müller's conversion to Catholicism as early as 1805[40].

As a result of Schmitt's observations he stated that romanticism is "subjectified occasionalism" because in romanticism "the romantic subject [i. e.,] the world, is treated as occasion and opportunity . . ."[41]. God as a point of reference is replaced by the "genial 'I'"[42]. This permits the romantics, Schmitt observed, to take anything in the world as a starting point and make of it an important, but impermanent episode[43]. According to this argument it follows that revolution as well as counterrevolution, Catholicism as well as heresy, can be taken as occasions for the romantic subject.

Schmitt agreed with Novalis that in "romanticism everything becomes the 'beginning of a never ending novel *(Roman)*'"[44]. The subjective approach to everything leads not only to indecision, according to Schmitt, but also to alliances with the most diverse political trends. The romantics can indulge in this kind of shifting because they, as contrasted with the Catholics, have no basic *Weltanschauung* emanating from one source. Consequently, Schmitt argued, since they cannot hold on to a definite political idea for any length of time[45], indecision and weakness of character best describe the predicament of the rootless romantics.

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[40] Carl Schmitt, *Politische Romantik*, pp. 57—59, 61.

[41] *Ibid.*, p. 23.

[42] *Ibid.*, p. 24.

[43] *Ibid.*, p. 22.

[44] *Ibid.*, p. 26. The German word *Roman* and romanticism have the same etymological root.

[45] *Ibid.*, p. 77.

That the romantics were rootless is understandable, because romanticism has never been a political movement. But Schmitt never claimed that they constituted a political movement, or that they possessed a set of uniform ideas on specific political questions. He stated that German political romanticism was nothing more than the "Begleitung der aktiven Tendenzen ihrer Zeit und ihrer Umgebung"[46]. German romanticism, Schmitt continued, first romanticized the Revolution, then the Restoration, and since 1830 again the Revolution[47]. As was already mentioned above, Schmitt's concern with this topic was nothing more than his desire to define his position in life. That he intended to follow the Catholic church, rather than rely on his "genial 'I,'" is beyond doubt.

But already Schmitt's early writings betray an unmistakable belief in the uniqueness of historical events. This certainly borders on the subjective-occasionalistic temper of romanticism. Indeed, some critics have observed that Schmitt himself painted his own picture in his portrait of Müller[48]. But Schmitt would argue that this is false, because he believes his starting point to be always a specific aspect of jurisprudence. According to him he is not a lawyer one day, a composer the next and on the following day a poet[49].

The more Schmitt absorbed himself in actual constitutional questions in the 1920's, the more the theological counterrevolutionaries receded from his thoughts, and his attacks upon romanticism ceased. Now other thinkers came to the fore: Bodin and Hobbes. From Bodin Schmitt took that part of his definition of sovereignty which deals with its absolute nature[50]. From Hobbes Schmitt borrowed the belief that *auctoritas, non veritas facit legem.* He who has authority (authority and power are here combined) can demand obedience, and it is not always the legitimate sovereign who possesses the needed authority. The

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[46] *Ibid.*, p. 227.

[47] *Ibid.*, pp. 227—228.

[48] Eduard Rosenbaum, "Carl Schmitt vor den Toren," *Rheinischer Merkur*, No. 48, November 1950, p. 18; Christian Graf von Krockow, *Die Entscheidung: Eine Untersuchung über Ernst Jünger, Carl Schmitt, Martin Heidegger* (Stuttgart: Ferdinand Enke Verlag, 1958), p. 92.

[49] On a number of occasions Schmitt has even proved to be a successful poet. Furthermore, Schmitt counted among his friends two known modern German poets, Theodor Däubler and Konrad Weiss. Carl Schmitt, "Zwei Gräber," *Ex Captivitate Salus . . .*, pp. 45, 51.

[50] Jean Bodin, *Les six Livres de la Republique* (2nd French ed.; Chez Jacques du Puys, 1580), p. 122.

obvious implication is that the sovereign who could not protect the subject had no right to demand obedience. And this was exactly what Hobbes meant by the "mutual Relation between Protection and obedience,"[51] which Schmitt was never tired of citing. Both Bodin and Hobbes, according to Schmitt, gave him more realistic "answers to international and constitutional law questions of [Schmitt's] time than the commentaries to Bismarck's [constitution] or the Weimar constitution or the publications of the Geneva League"[52].

Rousseau and Hegel also left their imprint upon Schmitt. Two related ideas which Schmitt adopted from Rousseau and reinterpreted are the concept of the identity between ruler and ruled, and the belief that the general will must be the basis of the state's action. In Rousseau the identity between ruler and ruled (in itself an old formula) found its expression in his concept of the general will in which each member of the community was sovereign and subject almost simultaneously[53]. Within Schmitt's structure the general will was incorporated in one person only, he who was chosen by the German people. Schmitt rejected the thought that the people could participate in all aspects of decision making[54]. Hence we may say that sometimes he approached the Jacobin logic of Robespierre who maintained that the people may deceive themselves about the "general will," and therefore must be "forced to be free"[55]. The main difference between Schmitt and Robespierre is that the latter had an unlimited faith in the educability of the people. One does not find such optimism in Schmitt's writings.

Mention has to be made of Hegel's belief in the historical process. That this process is not static[56] had already been recognized by Hera-

[51] Thomas Hobbes, *Leviathan, or the Matter, Forme, and Power of a Commonwealth Ecclesiasticall and Civill* (Introduction by Pogson Smith; London: Oxford University Press, 1952), p. 556. See also: Carl Schmitt, *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (München: Duncker & Humblot, 1921), pp. 22—23. Hereafter: *D.*

[52] Carl Schmitt, "Ex Captivitate Salus," *Ex Captivitate Salus . . .*, p. 64.

[53] Jean Jacques Rousseau, "The Social Contract," *The Social Contract and Discourses* (Translated with an introduction by G. D. H. Cole; New York: E. P. Dutton and Company, Inc., 1950), pp. 16—17.

[54] Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus (2nd ed.;* München: Duncker & Humblot, 1926), p. 22. Hereafter: *GGL.*

[55] Jacob L. Talmon, *The Origins of Totalitarian Democracy* (London: Secker & Warburg, 1955), p. 106.

[56] This meant for Schmitt, among other things, that eternal values are nonexistent.

clitus who said that "You could not step twice in the same rivers; for other and yet other waters are ever flowing on"[57]. So, says Schmitt, one cannot make the same speech or write the same essay twice[58]. Situations constantly change, and therefore, according to Schmitt, important questions of today must not be phrased and answered in terms of the era of Talleyrand and Louis Philippe[59]. Hence Schmitt accepted the belief that history is a constantly changing process or, as he stated: "Eine geschichtliche Wahrheit . . . ist nur einmal wahr" (a historical truth in history is true only once)[60]. Therefore one does not find in Schmitt's writings references to a final goal of history as is the case with Hegel. Schmitt is basically interested only in situations and problems in which he participates personally and to which his fate is linked. His question-answer method must be understood in this context only. As was already stated in the Preface, specific questions demand specific answers; in Collingwood's phrase, which also applies to Schmitt: "A highly detailed and particularized proposition must be the answer, not to a vague and generalized question, but to a question as detailed and particularized as itself[61]."

Schmitt's belief in the uniqueness of historical events and his low estimate of human nature reveal an implicit distinction in his thinking between fundamental and incidental events. His opinion of the nature of man can be assumed to be a more fundamental hypothesis and therefore not easily changeable by the course of history. In Schmitt's criterion of politics as the distinction between friend and enemy is contained this fundamental assumption of man's nature, and the criterion may therefore be applicable to our epoch, the epoch of the national sovereign state. This certainly implies that a new type of man *(homo hominis homo novus)* may eventually emerge. But what constitutes enmity and

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[57] Milton C. Nahm, ed., *Selections from Early Greek Philosophy* (3rd ed.; New York: F. S. Crofts & Co., 1947), Fr. 41—42, p. 91.

[58] Carl Schmitt, *Positionen und Begriffe . . .*, Foreword.

[59] *Ibid.*

[60] Carl Schmitt, "Die geschichtliche Struktur des heutigen Weltgegensatzes von Ost und West: Bemerkungen zu Ernst Jüngers Schrift 'der gordische Knoten,'" *Freundschaftliche Begegnungen: Festschrift für Ernst Jünger zum 60. Geburtstag* (Edited by Armin Mohler; Frankfurt a/M: V. Klostermann, 1955), p. 147.

[61] R. G. Collingwood, *An Autobiography* (2nd ed.; London: Oxford University Press, 1951), p. 32.

friendship at a given moment in our epoch can be derived only from the concrete situation.

Hegel's belief that the state is a sphere of objective reason and as such an entity superior to all other human associations[62] is shared by Schmitt. In Schmitt as well as in Hegel civil society exists, but in both it constitutes only one moment in the state's structure. The difference between Hegel and Schmitt is, however, that to the former the state was a means to realization of the highest form of existence, while Schmitt was mainly concerned with rescuing the German state of his time from the encroachments of civil society, and consequently also maintaining it as a powerful entity in international relations[63]. Schmitt may be classified as a Neo-Hegelian in so far as he believed that the Weimar state — and particularly, the president, the officialdom, and the *Reichswehr* — constituted a sphere of objective reason in comparison with the egoism of pluralist groups.

Some influence on Schmitt's writings was also exerted by Max Weber in whose seminar Schmitt participated at Munich in 1919—1920. This influence concerned mainly the categories Schmitt utilized in discussing the presidial system and the question of legality and legitimacy. Mention may therefore be made in this context of Weber's three well known types of legitimacy: charismatic, traditional and legal[64]. However, Mommsen's claim that Schmitt in his treatment of the Weimar constitution was only a "docile disciple" *(gelehriger Schüler)* of Max Weber, seems exaggerated[65] for, as will be seen, Weber's influence on Schmitt was not very profound.

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[62] J. W. F. Hegel, *Philosophy of Right* (Translated with notes by T. M. Knox; Oxford: At the Clarendon Press, 1953), p. 156.

[63] Carl Schmitt, *Der Hüter der Verfassung* (Tübingen: Verlag von J. C. B. Mohr [Paul Siebeck], 1931), pp. 88, 115. Hereafter: *HV*.

[64] Max Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie* (4th ed.; Edited by Johannes Winckelmann: Tübingen: J. C. B. Mohr [Paul Siebeck], 1956), 1. Halbband, p. 124.

[65] Wolfgang J. Mommsen, *Max Weber und die deutsche Politik 1890—1920* (Tübingen: J. C. B. Mohr [Paul Siebeck], 1959), p. 380. See also Mommsen's remarks in the "Diskussion zum Thema: Max Weber und die Machtpolitik," *Max Weber und die Soziologie heute: Verhandlungen des fünfzehnten deutschen Soziologentages* (Edited by Otto Stammer and Rolf Ebbinghausen; Tübingen: J. C. B. Mohr [Paul Siebeck], 1965), p. 135. Someone even referred to Schmitt as a "'natural son'" of Max Weber. See the comments by Jürgen Habermas in the "Diskussion zum Thema: Wertfreiheit und Objektivität," *Max Weber und die Soziologie heute . . .*, p. 81.

Part One

Schmitt and the Weimar Constitution: 1921-1933

Chapter I

The Meaning of Dictatorship

Schmitt's writings of the early 1920's dealt largely with legal problems as they pertained to the Weimar constitution. These legal points were developed against a background of extreme unrest. Crises in Germany were the rule rather than the exception. The circumstances under which the republic was born were far from normal. The problems that beset Germany even before Scheidemann proclaimed the republic, on November 9, 1918, were only a prelude to the uprisings of the People's Naval Division in Berlin in 1918, or the blood bath in the Berlin *Vorwärts* building on January 11, 1919. These and many similar incidents throughout Germany were responsible for widespread disorder which at times bordered on civil war. Crises did not cease even with the founding of the republic in August 1919. By May 1920 Germany was beginning to experience financial problems which became alarming by January 1921, chaotic by November 1922, and fantastic when the old mark was finally replaced by a new currency in November 1923. The Kapp *Putsch* of March 1920, the Communist uprisings in Thuringia and Saxony, the Beer Hall *Putsch* of November 1923, and the ever rising unemployment must not be overlooked, because they were decisive events in the first years of Weimar's existence.

It was in this atmosphere that Schmitt published a significant study on the nature of dictatorship *(Die Diktatur,* 1921)[1]. This study dealt with: (1) the nature of dictatorship in general, and (2) the nature of the president's dictatorship which was based on Article 48 of the Weimar constitution. The reason for including the latter was to show some of the constitutional rights the president possessed in order to deal with

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[1] *D.*

crises in Germany. To define correctly the type of dictatorship which Article 48 provided, Schmitt investigated dictatorships that had existed previously as well as the Soviet dictatorship which had just emerged.

1. The Distinction between Commissarial and Sovereign Dictatorship

In defining a dictatorship Schmitt's starting point was Bodin's distinction between sovereignty and dictatorship. "Sovereignty," according to Bodin, "is the absolute and perpetual power of a republic which the Latins call maiestatem . . ." and which is exercised either by the people or the prince. The dictator, on the other hand, is "neither prince, nor sovereign magistrate . . .," but one who holds a commission from the sovereign to accomplish certain tasks, such as "to wage war," "reform the state," and similar assignments. The dictator's powers are neither absolute nor perpetual[2].

However, according to Bodin, not everyone who holds a commission is necessarily a dictator. He distinguished two types of magistrates who hold commissions: the officers and the commissioners. "The officer is the public person who possesses ordinary charge *(charge ordinaire)* limited by edict. [And the] commissioner is the public person who has extraordinary charge limited by simple commission[3]." The essential difference between the two is that the former is bound by law while the latter receives specific orders from the sovereign to accomplish certain tasks. For our purpose only the latter, namely the commissioner, is of interest, for he may be the dictator in Bodin's sense. Although Bodin classified many types of commissioners according to their commissions, he did not do so effectively. The commissioners who received extraordinary powers to conduct wars were, according to Schmitt, thrown together with those who inspected meat or those who were sent on ambassadorial missions[4]. To distinguish the dictator from other types of commissioners Schmitt suggested that the dictator in Bodin's system should be referred to as *Aktionskommissar*[5].

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[2] J. Bodin, *Les six Livres de la Republique* (2nd French ed.; Chez Jacques du Puys, 1580), pp. 122—123.

[3] *Ibid.*, p. 372.

[4] *D*, p. 38.

[5] *Ibid.*, p. 39.

In keeping with this definition of sovereignty and dictatorship, Bodin commented that the nature of Sulla's and Caesar's rule was not sovereign because the rights of the tribunes, at least formally, continued to be recognized. The true sovereign, according to Bodin, does not recognize anyone above himself but God[6].

Schmitt, too, justly stated that a basic difference existed between the dictatorships of Sulla and Caesar and previous dictatorships. Usually the dictator in Rome was appointed by the Consul at the request of the Senate. The dictator's task, according to Schmitt, may include the waging of war, the suppression of an insurrection, etc. His aim is to eliminate an existing critical situation so that the suspended constitution (in exceptional times a part or even the entire constitution may be temporarily suspended) may again be revived. To accomplish his immediate goal — the elimination of the critical situation — the old republican dictator was appointed for six months, but often relinquished his rule before the expiration date — depending naturally on the situation. The dictatorships of Sulla and Caesar, although still referred to as dictatorships, differed considerably from the old republican practice. Sulla was appointed dictator for an indefinite period. He stepped out of office after he had increased the power of the Senate and set the Gracchan constitution aside. Caesar's dictatorship finally extended for life. Moreover, all of Caesar's actions prove, according to Rostovtzeff, that he looked on the existing constitution as useless and obsolete[7]. In attempting to understand the nature of dictatorship, it is essential to know, Schmitt pointed out, the time element involved, and whether the dictatorship aims at preserving or abrogating the existing constitutional order[8].

What about the so-called dictatorship of Wallenstein in the seventeenth century during the Thirty Years' War? His rule is treated by many historians as an example of dictatorship. According to Schmitt, however, not every rule which appears to be absolute is necessarily dictatorial in nature[9]. Of special interest in Wallenstein's case were

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[6] Bodin, *Les six Livres . . .*, p. 124.

[7] Michael Ivanovich Rostovtzeff, *Rome* (Translated from the Russian by J. D. Duff; A Galaxy Book; New York: Oxford University Press, 1960), p. 133.

[8] *D*, pp. 1—3.

[9] *Ibid.*, pp. 79—80.

the legal implications connected with his two commissions in 1625 and 1631.

Schmitt analyzed these two commissions and noted that neither should be referred to as dictatorships, as has usually been done. Wallenstein's first appointment in 1625 to lead the Kaiser's army was merely, according to Schmitt, a military commission[10]. And because of its exclusively military nature Wallenstein was not permitted to encroach upon the rights of the estates. Hence, his status was, Schmitt concluded, nothing but that of a commanding general[11]. Wallenstein's dismissal by the Kaiser in 1630 was followed in 1631 by his reinstatement. This marked the beginning of the second period of his army leadership that lasted until his murder in 1634. Again Wallenstein's rule was, in Schmitt's view, nothing but that of a commanding general of the Kaiser's army, in spite of the fact that in his second commission he was given chief command in *absolutissima forma.* Since the dictator had to have the right, according to Schmitt, to encroach upon the valid legal order, he concluded that Wallenstein's commission could not properly be called dictatorship, because a general state of exception with regard to the valid legal order did not exist[12].

The essential points of a commissarial dictatorship which emerge are: (1) that it occurs at the moment when an established state of affairs is sufficiently threatened to warrant the appointment of a dictator, (2) the dictator is appointed by the sovereign — a *pouvoir constitué*[13] — to accomplish a specific mission, and when it has been accomplished the dictator's task ceases, (3) in order for the mission to be successful, Schmitt said, the commissarial dictator may temporarily suspend or make extreme inroads into the constitution and the domain of ordinary legislation, but he may not abrogate existing laws from the statute books. According to Schmitt, a commissarial dictator suspends the constitution in order to protect and reinstate it after the danger is over[14]. Hence the dictator's task is to eliminate the danger and to

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[10] *Ibid.*, p. 82.

[11] *Ibid.*, p. 85.

[12] *Ibid.*, pp. 93, 95. Actually, Schmitt noted, the central juristic problem during both periods was: Could the Kaiser decide on his own whether a state of exception existed or did he have to obtain the concurrence of the seven electors?

[13] *Ibid.*, p. 146.

[14] *Ibid.*, p. 136.

strengthen the foundation which has been threatened. But the new elements in Sulla's and Caesar's dictatorships bordered on what Schmitt called sovereign dictatorship. The latter found its full expression for the first time during the French Revolution[15].

Among the differences between a commissarial and a sovereign dictatorship are, according to Schmitt, the fact that the former is based upon the *pouvoir constitué* appointing the dictator, while in the latter instance the appointment depends upon the *pouvoir constituant* of the people. Sometimes, however, the *pouvoir constituant* is recognized solely by the sovereign dictator himself[16], as was the case between 1793 and 1795 in France and since 1917 in the Soviet Union. Other significant points of a sovereign dictatorship are the length of time it may last, and the conflict between the existing constitutional legal order and the future one[17].

From the viewpoint of political theory Schmitt traced the idea of sovereign dictatorship to the eighteenth-century Enlightenment philosophy, especially to Mably and Sieyès. According to Schmitt, Mably advocated as early as 1756 the notion that during a revolution the representatives of a people should conduct all affairs and take executive power into their own hands[18]. Although Mably still spoke of dictatorship in the antiquated Roman juristic sense, he nevertheless veered toward a new interpretation. Dictatorships set in when the laws become eroded and corruption becomes too great. To him, said Schmitt, "the dictator appears ... as a type of reform commissioner with unlimited powers vis-à-vis the entire constituted state organization"[19]. Therefore, in Schmitt's view, if Mably's statement with regard to the people taking over the executive power during a revolution were to be

[15] Despite Bodin's awareness of the historical facts of Sulla's and Caesar's dictatorships he still treated them in the old institutional sense of dictatorship.

[16] *D*, p. x. Since the Revolution of 1917 the Communists, for example, have declared their rule to be in the name of the proletariat, but have never given the working class a true chance to voice their opinion on the ruling group.

[17] *Ibid.*, pp. 139—140, 201—202.

[18] *Ibid.*, pp. 115—116. On May 18, 1790, Robespierre, taking cognizance of Mably's enmity toward the executive power, told the convening Assembly "that only the legislature may decide about war and peace, because it has the least interest in abusing its power, the king on the other hand is inclined ..." to misuse his powers. *Ibid.*, p. 115.

[19] *Ibid.*, p. 116.

coupled with his conception of the dictator as a reform commissioner, then the new dictatorship of the National Convention could no longer be understood as "commissarial dictatorship [i. e., a dictatorship aiming to preserve the threatened valid legal system], but must be understood as a sovereign revolutionary dictatorship"[20]. Thus the antithesis which Bodin had set up between sovereignty and dictatorship was dissolved, and the union between the two had great consequences for the origin of totalitarianism.

References to the *pouvoir constituant* are found in Sieyès' remarks on the third estate. "The third estate ... comprises everything appertaining to the nation; and whatever is not the third estate may not be regarded as being of the nation. What is the third estate? Everything[21]!" The *pouvoir constituant,* according to Schmitt, possess all the rights to give themselves any kind of constitution they desire. But the will of the amorphous people is vague. At most, they can, for example, assert their desire to have a constitution. Thus Sieyès touched on the concept of representation. The representatives of the amorphous people are commissioners in the true sense of the word, and it is their task to define the general desires of the amorphous people. These people never organize themselves, but always other entities. Hence the representatives of the people, viz: commissioners, base their power, according to Schmitt, on the amorphous people — the *pouvoir constituant* — to whom they constantly appeal and who, in turn, could then act[22].

In its activities the National Convention was an example of sovereign dictatorship. The National Convention, which met on September 20, 1792, was the extraordinary organ of a *pouvoir constituant.* It was commissioned to draw up a constitution which was completed, submitted to the people, and finally accepted by them in 1793[23]. With the acceptance of the constitution the task of the National Convention was accomplished. Consequently, after its commission was completed it ceased to be the extraordinary organ of a *pouvoir constituant.* Although its task came to an end when the constitution was accepted, the National Convention decided, on October 10, 1793, not to dissolve

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20 *Ibid.*

21 John Hall Stewart, *A Documentary Survey of the French Revolution* (New York: The Macmillan Company, 1951), p. 44.

22 *D,* pp. 143—145.

23 The throne was overturned on August 10, 1792, and the French constitution of 1791 was cast aside.

until the threat of war and the internal counterrevolutionary activities were eliminated. The constitution was then suspended, but not abrogated; yet, incidentally, it was never restored. The crucial point was that the National Convention had never been entrusted with the power to suspend the constitution. To meet the external and internal dangers, a committee of the National Convention *(comité du salut public)* was established on April 5, 1793 with far reaching powers to put an end to these threats. The source of the committee's power was the National Convention which, according to Schmitt, was not only a self-appointed body since October 10, 1793, but "derived" its authority from a *pouvoir constituant* which only the National Convention recognized[24].

A twentieth-century example of sovereign dictatorship is based on the Marxian philosophy of history as interpreted by Lenin, Trotsky and Radek. The Marxian philosophy of history aims at bringing about a condition in society in which economic classes will cease to exist. The "true" Marxians argue, according to Schmitt, that "the bourgeoisie is a 'class condemned by history to die'". Because the proletariat is historically the rising class, it has a right to apply force against the bourgeoisie. The use of force by the historically rising class may take place "whenever it seems to be in the interest of historical development" in the relation between the historically rising and historically declining class. "Whoever is on the side of things *(Dinge)* to come," Schmitt observed, "may also push what is [already] falling[25]." From this it becomes obvious that the Marxian philosophy of history finds its *raison d'être* in the historical mission of the working class — the *pouvoir constituant* is here identified with the proletariat only — which is the bringing about of the Communist millenium[26].

A sovereign dictatorship, said Schmitt, "sees in the total existing order the situation which it seeks to do away with through its actions". The existing constitution is not merely suspended, but abrogated. The final aim of a sovereign dictatorship is "to create a condition whereby a constitution which it considers to be a true constitution will become possible"[27].

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[24] *D*, p. 152.

[25] *Ibid.*, p. viii.

[26] *Ibid.*, pp. vi—viii.

[27] *Ibid.*, p. 137.

The difference between the two types of dictatorship is crucial, for these categories are present by implication in many of Schmitt's subsequent writings. However, the question that now arises is whether the nature of commissarial and sovereign dictatorship is not essentially a matter of sovereignty. Should Bodin's definition of the absolute and perpetual nature of sovereignty be accepted, then of course, the commissarial dictator is at no time sovereign because his powers are derived from the *pouvoir constitué*. The commission may be terminated by the sovereign at any time. If the commissarial dictator were to resist the revocation of his commission, then he could become sovereign dictator or even sovereign. That sovereign dictatorship cannot be equated with sovereignty is also self-evident. Furthermore, in the instance of France it must be remembered that the *raison d'être* of the National Assembly ceased after France inflicted heavy losses on her foreign enemies and, also, when the royalist cause inside France no longer posed a threat. The National Convention finally ceased to exist in October 1795, approximately two months after completing the new constitution of the Year III. Thus the underlying difference between sovereignty, sovereign dictatorship, and commissarial dictatorship is that the latter two depend on commissions while sovereignty is essentially of an independent nature because it is not based on a specific commission, and does not have to have a time limit.

Schmitt's definition and discussion of dictatorship must by no means be viewed as an exhaustive contribution to the one big topic of dictatorship[28]. His treatment of this subject is important to students of political philosophy, for it enables them to analyze the types of rule by the intentions of the power holder as reflected in his actions. For constitutional lawyers, too, the distinction drawn is crucial, and in the instance of Weimar the distinction between commissarial and sovereign dictatorship had profound overtones. As was already pointed out, the

[28] Not long ago, for example, Maurice Duverger in his pamphlet *De la dictature* (Paris: Julliard, 1961) distinguished two types of dictatorship: the technical and sociological. He calls the former "parasitaire," because it is fomented by certain isolated segments in society (p. 19). The Algerian *Putsch* of May 13, 1958, was essentially an example of a technical dictatorship (p. 95). A sociological dictatorship, on the other hand, is caused by the discontent of an entire society (p. 19). Since a general discontent could not be detected in France proper, a sociological dictatorship did not exist there in 1960 (p. 18). Duverger's categories are unfortunately tied too closely to the situation in Algeria and France and therefore they are somewhat impressionistic.

republican form of government was born under adverse conditions, and had, generally speaking, few supporters. In the wake of economic and political crises, the attention of law abiding citizens was focused on the president, for it was he who had been empowered by the constitution (Article 48) to undertake measures which would assure order in the country. However, the question which arose was: What were the constitutional rights and limits of a president during a crisis? It was in this context that Schmitt interpreted the role of the president in the early Weimar years as that of a commissarial dictator.

2. The Commissarial Nature of Article 48

Two different problems are touched upon by Article 48. Section 1 specifically refers to the individual German states, and the right of the president to compel each to carry out its duties (federal execution). Sections 2—4 are concerned with the dictatorial powers which the president must assume if public security and order are threatened. Section 1 is of secondary interest and will be discussed in another chapter. Also section 5 will here be left aside and treated later as an illustration of the great increase of the president's powers because Article 48 was not more clearly circumscribed by a special law as section 5 prescribed. Hence sections 2—4 are for us the center of gravity now.

Article 48 states:

Section 2 If, in the German Reich, public security and order is considerably disturbed or endangered, the Reichspresident may undertake necessary measures in order to restore public security and order, and if necessary intervene with the aid of armed forces. For this purpose he may suspend, temporarily, in part or entirely, the basic rights as provided in Articles 114, 115, 117, 118, 123, 124, and 153.

Section 3 All measures undertaken in accordance with sections 1 or 2 of this Article must be immediately reported to the Reichstag by the Reichspresident. These measures are to be suspended if the Reichstag so demands.

Section 4 In case of delay the state government may in its region undertake temporary measures as provided for in section 2. These measures are to be invalidated if the Reichstag so demands[29].

[29] F. Giese, *Die Reichsverfassung vom 11. August 1919* (6th ed.; Berlin: Carl Heymanns Verlag, 1925), p. 163.

Article 48 was utilized many times by President Ebert to safeguard the Weimar republic[30]. Although the intentions of the framers of the constitution were to use Article 48 in case of political disturbances, its application was soon (October 12, 1922) extended to include economic disasters[31].

Schmitt's general concern between 1921 and 1924 was to arrest the disintegration of the state machinery (the army and the civil service) and to preserve the essential features of the Weimar system. Therefore he set for himself the specific task of exploring the juristic possibilities which the Weimar constitution offered in order to combat crises. Thus Schmitt went into a detailed discussion of Article 48, especially the second section.

In examining section 2 Schmitt raised and developed the following points at a convention of jurists at Jena in 1924: (1) are the enumerations in sentence 2 of section 2 meant to limit sentence 1 section 2? and, (2) what are the general limits and possibilities under Article 48[32]? It was Schmitt's belief that it would be impossible to deal effectively with a state of exception if the president were limited and prevented from encroaching upon all other articles, except those enumerated in sentence 2[33]. Proceeding from this point, Schmitt argued that sentences 1 and 2 of section 2 contradict each other. Sentence 1 permits the president to "undertake necessary measures in order to restore public security and order, and if necessary intervene with the aid of armed force," while sentence 2 begins with the illogical phrase "For this pur-

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30 Because enabling acts were not always passed in time, the president could act solely on Article 48. Thus, for example, "out of the 150 — odd legislative measures published between October 13, 1923 and February 15, 1924 about 110 were issued by the Cabinet by virtue of the two enabling acts [of October 13, and December 8, 1923] and some 17 on the basis of Article 48." Clinton L. Rossiter, *Constitutional Dictatorship* (Princeton: Princeton University Press, 1948), p. 49.

31 "The old German state of war had nothing to do with economic distress. It was utilized not only primarily but exclusively to meet civil unrest. The procedures recognized under the state of war were administrative and not legislative in nature. In the years before 1914 Germany knew little of unemployment, inflation, and other extremes of economic maladjustment which can imperil the order and even existence of a state as surely as can outright civil war." *Ibid.*, p. 42.

32 The points presented by Schmitt were reprinted in full as an appendix to the 2nd edition of *D* in 1928.

33 *D* (1928), p. 216.

pose he may suspend . . ."[34] a number of basic rights. Did sentence 2 imply, therefore, a limitation of the authority given the president under sentence 1? Schmitt argued in the negative.

He traced the history of Article 48 from its drafting at the Constituent Assembly in 1919, and noted that sentence 1 was drawn up independently of sentence 2, and that the latter was attached to the former in an arbitrary fashion. On January 3, 1919, Preuss had drawn up the original section which read: "'The Reichspresident can intervene . . . with the aid of armed force and undertake necessary measures to restore public security and order'". The second sentence starting with "For this purpose . . ." was drawn up in a different committee and was attached to the original version of sentence 1. On July 5, 1919, the phrase dealing with armed force was relegated to the last part of sentence 1 "because one did not want to mention the most extreme measure first . . .[35]." But sentence 2 remained unchanged. Thus, "'For this purpose . . .' does not . . . mean: in order to intervene with the aid of armed force. But for the same reason . . . it also does not mean: in order to undertake necessary measures. But it does mean: to restore public security and order". Schmitt argued that the proper meaning of sentence 2 is: "For the purpose of reestablishing public security and order the Reichspresident can undertake measures and he may suspend certain basic rights." He concluded by saying that sentence 2 says nothing of what can be done without suspending basic rights in order to achieve the purpose in the concrete case[36]. The most that sentence 2 states is that "if the measures of the Reichspresident consist of suspending basic rights, then the suspension is limited to certain enumerated rights"[37].

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[34] "For this purpose . . ." does not follow logically the phrase that precedes it: ". . . if necessary intervene with the aid of armed force." *Ibid.*, p. 224.

[35] *D* (1928), pp. 224—225.

[36] *Ibid.*, pp. 225—226.

[37] *Ibid.*, p. 225. This interpretation of Article 48 section 2 that almost everything can be undertaken by way of measures was rejected by Anschütz, the leading commentator on the Weimar constitution. It was his contention that other articles may not be suspended. This opinion was shared by the majority of constitutional lawyers as well as by the government and the German Supreme Court. See: G. Anschütz, *Die Verfassung des Deutschen Reichs* (11th ed.; Berlin: Verlag von Georg Stilke, 1929), pp. 252—253. Richard Grau and H. Nawiasky, the leading exponents of the legalistic view, maintained that with the exception of the seven articles which may be suspended, the other one hundred and seventy three articles of the constitution were

Thus from the latitude[38] given to the president he may undertake, by way of measures, almost any steps he deems proper to restore public security and order.

Since Schmitt's view was that almost anything could be undertaken by way of measures, we may now answer the second question, namely, what Schmitt considered to be the general limitations imposed by Article 48 section 2. The most specific answer is that the Weimar constitution cannot be abolished by invoking Article 48, for Article 48 may only be understood within the general frame of the Weimar constitution. Therefore the president cannot turn a republic into a monarchy by undertaking measures which would have that effect[39].

Furthermore, Article 48 provides for a basic institutional minimum which could neither be infringed upon or abolished by way of measures. Most important of these institutions are: (1) the president, (2) the government, and (3) the Reichstag.

Section 2 sentence 1 asserts the president's competence. But, Schmitt pointed out, "what the word Reichspresident means is deduced . . . only from the constitution . . ."[40]. Thus the president cannot, for example, on the basis of Article 48, extend his period in office or abolish his office. The government must also be preserved as an institution in view of Article 50 which required countersignatures of all orders and decrees without exception and stated that

> All orders and decrees of the Reichspresident, also those affecting the army, need for their validity the countersignature of the Reichschancellor or the proper Reichsminister. By this countersignature responsibility is assumed[41].

With regard to the Reichstag, Schmitt pointed out that its existence was also assured by virtue of Article 54 which states that the govern-

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sacrosanct — *enumeratio, ergo limitatio* — and insurmountable also for his measures. For a legal discussion of Schmitt's thesis (also E. Jacobi's viewpoint) and those of the legalists, see: Karl Schultes, *Die Jurisprudenz des Reichspräsidenten nach Artikel 48, Abschnitt II der Weimarer Verfassung* (Bonn: Ludwig Röhrscheid, 1934), pp. 23 ff.

[38] The president's latitude was increased because a Reich law was never passed defining the details of Article 48 section 5 ("Details will be provided in a Reich law."). Giese, *Die Reichsverfassung vom 11. August 1919*, p. 163.

[39] *D* (1928), p. 242.

[40] *Ibid.*, p. 245.

[41] Giese, *Die Reichsverfassung vom 11. August 1919*, p. 171.

ment must have its confidence[42]. Furthermore, Article 48 section 3 also provides that measures undertaken must be reported to the Reichstag, and that they must be suspended if the Reichstag so demands. In the event of a dissolution of the Reichstag, Article 25 states that the president must give a different reason each time he dissolves this body, and that new elections must take place within sixty days. The president, said Schmitt, "may not suspend or extend" the time limit of the provisions of Article 25 section 2[43].

The last significant point to be mentioned in this context is that the president, according to Schmitt, at this time in 1924, could not, on the basis of Article 48, decree formal laws, for that would contradict Article 68 which states in its section 2 that "The Reich laws are passed by the Reichstag[44]". In other words, the president may merely undertake certain measures, but cannot promulgate laws. Schmitt argued that the validity of a measure depends on its specific purpose. Different situations demand different measures[45]. Thus laws are not dependent on particular situations. They aim to be more general than just a temporary expedient to meet particular situations.

Schmitt's latitudinarian interpretation of Article 48 meant that in exceptional times the president must not be hindered in his exercise of power. To restrict freedom of action would hamper the president in his attempts to eliminate crises. In discussing the legalistic and latitudinarian approaches, Clinton Rossiter stated that Schmitt's "thesis was nearer the facts than was the strict and legalistic point of view"[46].

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42 *D* (1928), p. 245.

43 *Ibid.*, p. 246. Section 2 of Article 25 states that "the new elections must take place at the latest on the sixtieth day after dissolution." Giese, *Die Reichsverfassung vom 11. August 1919*, p. 115.

44 Giese, *Die Reichsverfassung vom 11. August 1919*, p. 204. See also *D* (1928), p. 250. This view did not prevail. Emergency powers were extended to the field of legislation. For a general discussion of this and related problems see Frederick Mundell Watkins, *The Failure of Constitutional Emergency Powers under the German Republic* (Cambridge: Harvard University Press, 1939), especially pp. 15—24. On the question of ordinance power of the government see Johannes Mattern, *Principles of the Constitutional Jurisprudence of the German National Republic* (Baltimore: The Johns Hopkins Press, 1928), pp. 453 ff.

45 *D* (1928), p. 248.

46 Rossiter, *Constitutional Dictatorship*, p. 69. Edwin Jacobi supported Schmitt's interpretation.

The extension of emergency powers to the legislative field would, in Schmitt's opinion, be pure usurpation by the president. This viewpoint, as F. M. Watkins pointed out, never gained many supporters[47]. It is indeed curious that, on the one hand, the dominant view declared each article except for the articles enumerated in Article 48 sacrosanct and, on the other hand, some of the same people[48] supported the extension of exceptional measures to the general legislative field so that they acquired the legal force of ordinary legislation. But the evolution from a purely military and police state of exception to an economic-financial one made it necessary that the president, as the master of the state of exception, should also receive legislative powers. This, however, was first recognized only after 1929.

It may be noted that Schmitt's understanding of the concept of dictatorship in the context of Article 48 did not have odious overtones. What he advocated was to an extent a variation on the theme of the classical Roman notion of dictatorship. At this early stage of Weimar's history he did not yet envision for Weimar a sovereign type of dictatorship.

A final point to be mentioned is that in 1960 the Bonn government presented to the Bundestag a draft of an emergency law — *Notstandsgesetz*. In the 1920's Schmitt, conforming with the general terminology, always spoke of a state of exception — *Ausnahmezustand*. Today, however, the term "state of emergency" rather than "state of exception" is preferred in Bonn. The reason for this preference may be explained, perhaps, by the psychological association of the state of exception with Article 48. It may be stated that the odiousness which this Article subsequently assumed in Weimar was due mainly to popular misconceptions, semi-educated writings and deliberate distortion of the facts. Hence, this Article was for many years a genuine taboo in the Bonn republic. The Basic Law of Bonn (1949) had carefully eliminated everything reminiscent of Article 48[49]. It is therefore surprising to read in the official Bonn government declaration to this draft of a state of emergency law that Article 48 was not the cause of Weimar's death.

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[47] Watkins, *The Failure of Constitutional Emergency Powers under the German Republic*, p. 19.

[48] Among others, G. Anschütz, F. Giese, and F. Poetzsch-Heffter.

[49] Theodor Maunz, *Deutsches Staatsrecht* (15th ed.; München: C. H. Beck'sche Verlagsbuchhandlung, 1966), p. 176.

> Article 48 was not able to prevent the end of the Weimar republic. Legend maintains, however, that it was the cause of its death .... But there can be no doubt today that without Article 48 the Weimar republic could not have existed for fourteen years ...[50].

In view of this official declaration by the Bonn government, Schmitt's urgings, that in abnormal times it was the duty of the president to utilize Article 48 to put an end to disturbances, appear in another light. Therefore the legends diffused that Schmitt undermined the Weimar constitution — because of his latitudinarian interpretation of Article 48 — and paved the way for Hitler, are erroneous.

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[50] *Das Gesetz für die Stunde der Not: Materialien zur Auseinandersetzung über ein Sicherheitserfordernis* (Bonn: Bundesministerium des Innern, 1961), p. 12.

Chapter II

The Meaning of Sovereignty

The second major problem Schmitt was concerned with soon after his discussion of the nature of dictatorship was the concept of sovereignty. Schmitt's celebrated and often quoted definition of sovereignty states that:

> Sovereign is he who decides on the state of exception[1].

To restore order and peace the sovereign may, after his declaration of a state of exception, infringe upon the existing constitutional and ordinary legal system. He can, however, entrust a commissioner with full powers (i. e., to encroach upon some parts of the valid legal system) to accomplish the same end, and this commissioner may become a commissarial dictator. Only the sovereign, however, and not the commissarial dictator, in Schmitt's construction, may decide and declare a state of exception.

Many have commented on the nature of sovereignty. The various views have been summarized by Professor Friedmann.

> There have been those ... who set out to prove the absolute sovereignty, first of a monarch, later of the State; there are those on the other side, who have fought the law-making monopoly of the State on behalf of corporate bodies within the State, such as estates, churches, corporations. Again, other writers have proclaimed inalienable rights of the individual against all interference by authority; finally, the fight between national and international sovereignty is a persistent theme of juristic controversy[2].

1. Decisionism versus Normativism (Kelsen)

Schmitt's decisionism derives its meaning from his polemics against Kelsen's pure normativism. Schmitt argued that in itself the norm is

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[1] *PT*, p. 11.

[2] Wolfgang Friedmann, *Legal Theory* (3rd ed.; London: Stevens and Sons Limited, 1953), p. 415.

insufficient and becomes actual only by decision and interpretation. The decision is not only a pure emanation and application of the norm, but contains its own specific function. As such the juristic validity of a decision does not depend in an absolute manner on the normativist correctness of the decision. There are false decisions which, in spite of their falsity, become juridically valid. Schmitt stated in this context that:

> Die Entscheidung ist, *normativ betrachtet*, aus einem Nichts geboren[3].

The anti-normativist polemical meaning of this statement is crucial. On this particular point Schmitt was concerned with the question whether a moment exists in which a judge can make a decision as to which law must be applied to a specific case. Our interest does not center on this, but on the decisionist nature of sovereignty.

Decisionism, in the general sense of Schmitt's understanding of the concept, refers to two related points: (1) the capacity of an individual to establish order, peace and stability from a chaotic situation, and (2) that person's responsibility to safeguard the newly created stable situation. Should order, peace and stability break down, it becomes the task of this particular individual to undertake all necessary measures to reestablish order.

Both, Bodin and Hobbes, influenced Schmitt profoundly on his understanding of sovereignty. The decisionist element in Bodin found expression in his answer to the question: To what extent is the sovereign bound by the estates? He replied that his agreements with the estates are binding, but only as long as the sovereign can perform his duties. In exceptional moments, according to Bodin, agreements lapse[4]. Hence Bodin's major accomplishment was, in Schmitt's view, to incorporate the decisionist element into his concept of sovereignty[5].

Decisionism to Schmitt also meant Hobbes' *auctoritas, non veritas facit legem.* He who has authority (authority and power are combined here[6]) can make the laws. The sovereign, by virtue of his authority,

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[3] *PT*, p. 42. Italics added.

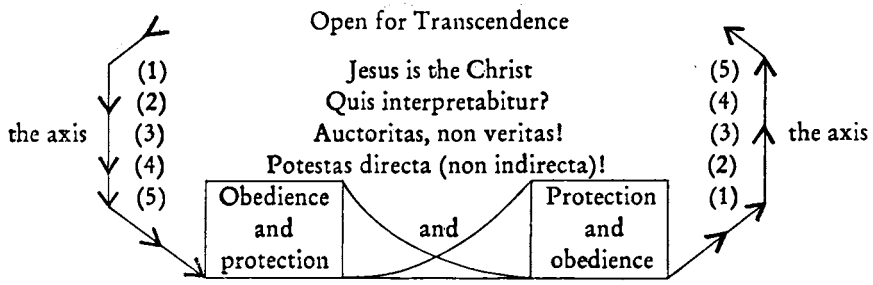
[4] J. Bodin, *Les six Livres de la Republique* (Fr. ed.; Chez Jacques du Puys, 1583), p. 215.

[5] *PT*, p. 14.

[6] Although authority is always present in the concept of power by virtue of the power holder's rule, it does not necessarily follow that authority is based on power. For example, authority may rest, according to Schmitt, on tradition.

can also demand obedience. But it is not always the legitimate sovereign, according to Hobbes' construction, who possesses authority. The implication is that the sovereign who cannot protect, has no right to demand obedience. And this is exactly what Hobbes meant by the "mutual Relation between Protection and Obedience[7]," which Schmitt has never tired of citing.

In amplifying the concept of decisionism which he had adopted from Hobbes, the central question Schmitt always asks is: *quis judicabit?* or in a more philosophical language: *quis interpretabitur?* Every religious, philosophical, or moral phrase needs interpretation. Who is the person who concretely decides? Schmitt, in his concern with Hobbes, developed the meaning of Hobbes' decisionism (to which Schmitt also adheres to essentially) in a number of seminar discussions at Ebrach in 1960. Accordingly[8]



This construction follows whether number 1 (reading from the top down) reads that "Jesus is the Christ" or some other maxim as "Liberty, Equality, Fraternity". Who interprets — *quis interpretabitur?* — what is said in number 1? The answer is contained in the axis: *auctoritas, non veritas.* Authority is here combined with *potestas directa* and not indirect power. Those in possession of *potestas directa* demand the obedience of individuals in exchange for protection. In looking at this diagram, reading upwards, the starting point is the individual. He obeys only those who can protect him. This is always the *potestas*

Carl Schmitt, *Verfassungslehre* (3rd ed.; Berlin: Duncker & Humblot, 1957), p. 75. Hereafter: *V.*

[7] T. Hobbes, *Leviathan, or the Matter, Forme, and Power of a Commonwealth Ecclesiasticall and Civill* (Introduction by Pogson Smith; London: Oxford University Press, 1952), p. 556. See also: *D,* pp. 22—23.

[8] *BP* (1963), pp. 121—123.

directa. The source which possesses *potestas directa* also possesses authority: the axis. By possessing both — *potestas* and *auctoritas* — this source is in the position to interpret whether "Jesus is the Christ," "Liberty, Equality, Fraternity," or anything else is, in concrete, "veritas".

Rather than advancing legitimist arguments in the monarchical sense, or the cause of a *potestas indirecta* in the clerical sense, Schmitt was mainly concerned with the established system, and whether it was capable of assuring order and peace. From this conviction Schmitt, bearing the Weimar republic in mind, went to considerable lengths in urging the creation of a strong authority and a strong state to overcome the constant crises. At this early stage, however, he was concerned mainly with the decisionist concept in legal theory: to break open Kelsen's norm system by including the exception within it.

Schmitt argued that the decisionist element was always present in Bodin and Hobbes, but that it was lost in the relatively stable period of the eighteenth century[9]. The antecedents of minimizing the decisionist element in sovereignty may be found, according to Schmitt, in Locke's theoretical structure which aimed at subjugating sovereign power to legal limitations[10]. The eighteenth century gradually saw the victory of Locke's idea, and, also, of Montesquieu's notion of the separation of powers.

But the attempt to subjugate sovereign power to legal limitations was not an acute problem in Germany until the latter part of the nineteenth century[11]. The question then was, who is the sovereign: the

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[9] *D*, pp. 24 ff.

[10] *Ibid.*, pp. 41. 102—103, 120.

[11] Rupert Emerson, *State and Sovereignty in Modern Germany* (New Haven: Yale University Press, 1928). Mr. Emerson pointed out that Wilhelm Eduard Albrecht in a review of a work by Maurenbrecher in 1837 asserted the need "for establishing the concept of the State-person in the very center of public law" (p. 52). Gerber not only took over Albrecht's notion of state-person, but went on to deny "that the concept of sovereignty had any connection with the position of the monarch" (p. 54). The right of the "monarch is not the free right of an individual to will as he chooses, but is bound by the institutional character of monarchy, as defined in the constitution of the particular State" (p. 55). Sovereignty as the personal attribute of the ruler was denied by P. Laband who believed the state to be "the sovereign person clothed with legally absolute rights over all its members, and as the source from which all public powers were derived" (p. 57). G. Jellinek, on the

monarch personally or the state as a special entity, the juristic personality of the state? The juristic personality theory of the state assumed that the state constituted a collective person to which all power belonged rather than to the person of the king. The implication was that power was no longer concentrated in one person. This construction finally paved the way for denying that sovereignty necessarily resided at any place in the state. This specifically German controversy concerned itself with where sovereignty resided and not the nature of it. But sovereignty as such was not yet denied.

The denial as such came from H. Krabbe, and, for the purpose of this study, the important legal theorist, H. Kelsen. Since sovereignty is essentially a political concept, Kelsen attempted to skirt its political nature by his development of a pure theory of pure law. His theory denied any content within the frame of jurisprudence. "Ideals of justice must be a matter of political science. A pure theory of law must be uncontaminated by politics, ethics, sociology, history[12]." The task of legal theory in Kelsen's construction is "to clarify the relations between the fundamental and all lower norms,"[13] in other words, the concretization from a basic norm, *Grundnorm,* to all lower forms of law. The question which arises is: How did the basic norm come about? To this Kelsen does not give an explicit answer, although he would agree that *potestas, non veritas facit legem.* Once a decision is taken with regard to any legal system then his theory of pure law is applicable. Professor Friedmann observed, therefore, that the sovereignty of parliament in "England is a fundamental norm, no more logically deducible than that the command of the *Führer* was the supreme legal authority in Nazi Germany or that native tribes obey a witch-doctor"[14]. To the question: Can a power-holder in France or in Switzerland forbid the inhabitants to read or write, or can he demand that one thousand citizens be murdered every Sunday? Kelsen replied that for the positivist it is essential to separate law *(Recht)* from morality. He

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other hand, advocated restricting "the omnipotent will of the State ... in order that the sway of law might be extended to its utmost possible limits" (p. 60). For the various implications and contradictions of this theory see the introduction by George H. Sabine and Walther J. Shepard to Hugo Krabbe's, *The Modern Idea of State* (New York: D. Appleton and Company, 1922).

12 See Friedmann, *Legal Theory,* p. 112.

13 *Ibid.,* p. 114.

14 *Ibid.*

argued that from the legal positivist viewpoint it is of no concern to him whether or not legal norms exist that force citizens to be put to death[15].

In view of Schmitt's concern with the decisionist aspect in sovereignty and his interpretation of Article 48, he also addressed himself to the following related questions: (1) Can a state of exception be subsumed to a general norm? and (2) What happens in a state of exception?

Kelsen and other positivist constitutional lawyers generally maintain that law is essentially norm[16] and that the theory of jurisprudence, including constitutional theory, pertains to norms only. A contrary opinion is held by Schmitt. According to him, each norm presupposes its normal situation, and becomes meaningless when this normal situation ceases to exist. For him the state of exception reveals what the routine of normalcy veils[17]. In Schmitt's view it is imperative that the constitutional lawyer recognize the exception as a juristic problem, despite the fact that the exception, according to Schmitt, cannot be subsumable to a norm and therefore strictly circumscribed[18]. The task of the constitutional lawyer is to keep his eyes open when faced with the exception and not shirk the range of juristic possibilities explicitly or implicitly inherent in every constitutional system, assuming that it is not suicidal. Concretely speaking, in the context of the Weimar constitution and Schmitt's writings of the early 1920's, a point to be scrutinized by the jurist would be the extent to which the legal system may be encroached upon without endangering its survival.

Schmitt criticized Kelsen for belonging to the Kantian tradition, and since Kant believed that "exceptional right is no right at all..." it becomes self-evident that Kelsen "does not know what to do with the state of exception..."[19]. Because Schmitt hinges his definition of sover-

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[15] Hans Kelsen, *Der Staat als Übermensch: Eine Erwiderung* (Wien: Julius Springer, 1926), pp. 5—6.

[16] Laws are nothing else than norm-relations. In other words, "the law unfolds in a gradual process from the highest norm, which is also the most abstract, general and purely norm-giving, to the lowest, which is completely individualised, concrete and executive." Friedmann, *Legal Theory*, p. 118.

[17] *PT*, p. 22.

[18] *Ibid.*, p. 12.

[19] In discussing the general existence of a hole in the Prussian constitution and law and referring specifically to the Prussian budget conflict of the 1860's,

eignty on the sovereign's power to make the decision about whether a state of exception exists, Kelsen is found at the opposite pole, not only avoiding the problem of the exception, but always trying to subject sovereignty to norms. *Die Souveränitätsvorstellung,* said Kelsen, *muss radikal verdrängt werden*[20]. Schmitt could reply to this assertion that Kelsen ignores the ever present possibility of a state of exception. Kelsen, on the other hand, could justly claim that Schmitt does not know what to do with the normal situation. Here two types of thinking are apparent. This contrast between Schmitt and Kelsen reveals a basic difference in the approach to the question of sovereignty.

To the question of what happens in a state of exception Schmitt observed that the sovereign

> decides whether the extreme case exists, as well as what should happen in order to put an end to it. He [the sovereign] stands outside the normally valid legal order and yet belongs to it, because he is competent to make the decision as to whether the constitution can be suspended entirely[21].

Furthermore,

> A normal situation must be created, and the sovereign is precisely he who definitively decides whether this normal situation actually exists.... [Thus] in the same manner as in the normal case, the independent moment of the decision can be pushed back to a minimum, so in the exceptional case the norm is pushed back[22].

What happens to the sovereign in normal times? From Schmitt's discussion it may be concluded that in normal times the sovereign is, so to speak, slumbering, and he is suddenly awakened at a crucial moment: namely, at the borderline between normalcy and the state of exception.

At this early stage of Weimar's existence Schmitt lamented the fact that the president was not as powerful as he would like him to be. Subsequently he observed that the president of a republic could never be

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Anschütz summed up the attitude of positivist constitutional lawyers by declaring: *Das Staatsrecht hört hier auf.* Georg Meyer, *Lehrbuch des Deutschen Staatsrechts* (7th ed.; Edited by G. Anschütz; Munich: Verlag von Duncker & Humblot, 1919), Vol. III, p. 906.

[20] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen: Verlag von J. C. B. Mohr [Paul Siebeck], 1920), p. 320. See also: Francis Rosenstiel, *Le principe de 'supranationalité': essai sur les rapports de la politique et du droit* (Preface by Julien Freund; Paris: Éditions A. Pedone, 1962), pp. 31, 34.

[21] *PT,* pp. 12—13.

[22] *Ibid.,* pp. 20, 19.

sovereign in the monarchical sense[23]. However, despite the limitations imposed upon him (i. e., Article 48 section 3, Article 50, etc.[24]), in exceptional times, according to Schmitt's interpretation of Article 48, he could, nevertheless, exercise his power adequately to restore order.

2. The Criterion of Politics: Friend and Enemy

Kelsen's attempt to banish politics from jurisprudence found its most extreme antithesis in Schmitt's concept of politics. He observed that politics is a sphere which is constantly dominated by the necessity of drawing distinctions between friend and enemy *(Freund und Feind)*[25]. This criterion of politics was not only an attempt on Schmitt's part to infuse politics into jurisprudence, something which Kelsen had attempted to eliminate, but also to reduce international relations essentially to an "either-or" formula.

Schmitt observed that not every antagonism, rivalry or antipathy necessarily constitutes enmity. It was in this context that he drew attention to the clearcut distinction drawn by the Greeks and Romans between the private and public enemy: ἐχθρός and πολέμιος, *inimicus* and *hostis*. Even the precept "love your enemies ..." *(diligite inimicos vestros)* (Matt. 5, 44; Luke 6, 27) clearly refers to the private enemy, *inimicus*, and not the public one, *hostis*[26]. Public enmity, according to Schmitt, is not a private matter, but in our epoch exclusively a concern of the political unit, the national sovereign state. The public enemy

> does not have to be morally evil, he does not have to be esthetically ugly, he does not have to appear as an economic competitor, and it can ... even be advantageous to have business dealings with him. He is nevertheless the other-one *(Andere)*, the stranger ...[27].

On the international level, just as on the domestic scene, the extreme outcome of enmity is war. Both can be ignited by such factors as

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[23] *D* (1928), p. 237.

[24] *Ibid.* (1921), p. 201.

[25] *BP* (1932), p. 14.

[26] *BP*, pp. 16—17. See also: Julien Freund, *L'essence du politique* (Paris: Éditions Sirey, 1965), pp. 442 ff.

[27] *BP*, p. 14.

religion, economics or morality. As these non-political conflicts increase in intensity, according to Schmitt, they become political[28].

Turning his attention to the political nature of the state, Schmitt said that "as long as a people exist in the political sphere, they must, even if only in the most extreme case ... determine for themselves the distinction between friend and enemy. In this lies the essence of their political existence"[29]. If the sovereign entity, the state, cannot at a crucial moment distinguish friend from enemy, then it has ceased to exist in the political sphere and, Schmitt added, there will always be another state which will assume this burden of politics. The protector then determines who the enemy is in view of the perpetual connection between Hobbes' protection and obedience[30].

In speaking of a protector assuming the right to distinguish for a weaker state friend from enemy, Schmitt had already veered in the direction of his *Grossraum* concept. Schmitt's *Grossraum* idea which he developed very sketchily in 1939 (as distinguished from the Nazi *Lebensraum* policy) is modelled, as has been already stated in the Introduction, on the Monroe Doctrine[31]. Because Germany was the dominant political entity in Central Europe Schmitt advocated Germany's right to make decisions involving the entire European continent[32]. Thus what the United States had succeeded in accomplishing in the Western hemisphere, and what Japan was aiming to accomplish in Asia, Schmitt urged for Germany.

Schmitt's *Grossraum* principle did not obviate the existence of national boundaries — something which was implicitly absent from the *Lebensraum* principle. Moreover, Schmitt stated in 1939 that warfare between national sovereign states — in terms of *Grossräume* — continued to be subject to agreed upon rules and regulations governing conflicts[33]. Since certain rules had to be adhered to, his understanding

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[28] *Ibid.*, p. 26.

[29] *Ibid.*, p. 38.

[30] *Ibid.*, p. 40.

[31] For a discussion of the different outlooks on geopolitics, and the Nazi concept of the Monroe Doctrine, see Franz Neumann, *Behemoth* (2nd ed.; New York: Oxford University Press, 1944), pp. 136 ff.

[32] Carl Schmitt, "Grossraum gegen Universalismus" (1939), *Positionen und Begriffe im Kampf mit Weimar — Genf — Versailles 1923—1939* (Hamburg: Hanseatische Verlagsanstalt, 1940), p. 302.

[33] Carl Schmitt, "Neutralität und Neutralisierung: Zu Christoph Steding 'Das Reich und die Krankheit der europäischen Kultur'" (1939), *Positionen und Begriffe* ..., p. 285.

of the public adversary since 1927 was in the "enemy" rather than "foe" context[34].

The German term *Feind* can be translated as enemy or foe. Here we encounter a difficult translation problem that is not only linguistic, but the symptom of a much more profound problem. It indicates an ambiguity in the concept as well as in Schmitt's thinking. To clarify this ambiguity a deviation from a chronological approach to refer to some of Schmitt's post-World War II writings is required. The "enemy-foe" distinction underlies particularly Schmitt's study *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*[35]. In it Schmitt was not yet entirely conscious of the linguistic problem, and therefore conceptually there are a number of ambiguities in so far as the "foe" and "enemy" often flow into one another. This no longer holds true for some of his most recent writings in which Schmitt is aware of the ambiguities in the *Feind* term[36].

Until very recently the "foe" term in English was considered antiquated and utilized mainly in a rhetorical sense[37], while the "enemy" term was usually utilized to designate an individual or a national sovereign state against whom war is waged by another national sovereign state within the frame of international law[38]. As will be shortly seen, since the 1940's the "foe" term has lost some of its archaic meaning[39].

In the Middle Ages the public "foe" on an emotional level was, as a rule, equated with the devil, and in fighting him no quarter was given.

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[34] Schmitt's *Begriff des Politischen* appeared first in the form of an article in 1927. *Archiv für Sozialwissenschaft und Sozialpolitik*, Band 58, Heft 1, pp. 1—33.

[35] (Köln: Greven Verlag, 1950).

[36] See the Foreword to the 1963 edition of Schmitt's *BP*, pp. 17—19; Carl Schmitt, *Theorie des Partisanen: Zwischenbemerkung zum Begriff des Politischen* (Berlin: Duncker & Humblot, 1963), pp. 55 ff.

[37] According to *The Oxford English Dictionary* (Oxford: At the Clarendon Press, 1933) a foe in early use was "an adversary in deadly feud or mortal combat." Vol. IV, p. 379.

[38] The dictionary cites a sentence from Thomas Jefferson which illustrates the difference between "foe" and "enemy": "Enemy goods are lawful prize." *Ibid.*, Vol. III, p. 166.

[39] For a fuller treatment of the "enemy-foe" distinction see George Schwab, "Enemy oder Foe: Der Konflikt der modernen Politik," *Epirrhosis: Festgabe für Carl Schmitt* (Edited by H. Barion, E.-W. Böckenförde, E. Forsthoff, and W. Weber; Berlin: Duncker & Humblot, 1968), Vol. II, pp. 665 ff.

Hence public conflicts were total in so far as no distinction was drawn between combatants and noncombatants, among other differentiations. The emergence of national sovereign states in Europe was accompanied by the gradual secularization of warfare, and it was in this context that the "foe" term gave way to the "enemy". Practically, this manifested itself by subjecting actual conflicts among national sovereign states to certain rules of the game by multilateral agreements which, incidentally, also permitted the existence of neutral national sovereign states[40].

With the decline of the epoch of the national sovereign state and the gradual emergence of another, the enemy concept is again beginning to change[41]. Whereas prior to the emergence of national sovereign states the "foe" on the emotional level was equated with the devil, the new "foe" is no longer the Christian devil. In Communist theory, according to Schmitt, the entire bourgeois capitalist system is condemned and the "foe" is now the "class-foe". Thus, Schmitt argued, the eighteenth and nineteenth-century European international law order which carefully circumscribed warfare became undermined[42].

As has already been pointed out, Schmitt's understanding of the public adversary prior to World War II was largely consistent with the "enemy" rather than "foe" concept. Therefore Professor Strauss' suggestion in 1932 that Schmitt's *status naturalis* was warfare among nations[43] cannot be supported, for such a state cannot exist as long as certain rules are explicitly recognized and adhered to. From Schmitt's writings in general it is not hard to deduce that his *status naturalis* is very much akin to Hobbes'. Schmitt's state of nature is civil war (such wars are not subject to any rules and regulations — except philosophical ones), and because of his fear of violence, Schmitt is always found on the side advocating order and law.

Because Schmitt's friend-enemy distinction is only a criterion and not a definition of what enmity constitutes at any given moment he has

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40 *BP* (1963), pp. 10—11.

41 See Schmitt's discussion in *Der Nomos der Erde . . .*, pp. 285 ff.

42 Carl Schmitt, *Theorie des Partisanen . . .*, pp. 56—57.

43 Leo Strauss, "Anmerkungen zu Carl Schmitts 'Begriff des Politischen'," *Archiv für Sozialwissenschaft und Sozialpolitik*, Band 67, Heft 6, August/September 1932, p. 737.

been accused of nihilism[44]. An argument may be advanced — but not from Schmitt's friend-enemy criterion alone — that in view of his outlook on the uniqueness of historical events, and the fact that we have not detected in Schmitt's writings (after he separated himself from the Catholic church in the middle 1920's) a basic set of eternal values to which he adheres, he may be classified as an adherent, to some extent, of the "historicists". According to Professor Strauss, the "historicists" maintain that "all human thought is historical and hence unable ever to grasp anything eternal"[45]. This inability of theirs is equated by Strauss with nihilism[46]. From Strauss' viewpoint Schmitt may certainly be called a nihilist. However, in coming down to the realm of the actual it becomes quite evident that Schmitt is anything but a nihilist. Although the crises in Weimar have usually been the starting points for his legal and political ideas, his aim was invariably to assure order, peace and stability. Nowhere in his writings can one detect a desire on his part to perpetuate crises as a means of escaping the tediousness of everyday bourgeois existence.

3. Political Unity versus Pluralism (Laski)

Schmitt's polemics against normativism and his criterion of politics paved the way for his polemics against Laski's pluralism. The background of this attack was furnished not only by the success of normativism in banishing politics from jurisprudence, but also by some tendencies of a so-called organic theory of the state which could be found in Gierke's doctrine of association. According to this theory the state was equated with all other associations in so far as all were in effect put on the same level[47].

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[44] See Heinz Laufer, *Das Kriterium politischen Handelns: Versuch einer Analyse und konstruktiven Kritik der Freund-Feind-Unterscheidung auf der Grundlage der Aristotelischen Theorie der Politik. Zugleich ein Beitrag zur Methodologie der politischen Wissenschaften* (Würzburg: Unpublished Ph. D. Dissertation, Bayerische Julius-Maximilian-Universität zu Würzburg, 1961), p. 296.

[45] Leo Strauss, *Natural Right and History* (2nd ed.; Chicago: The University of Chicago Press, 1957), p. 12.

[46] *Ibid.*, p. 5.

[47] For a detailed discussion and interpretation of Gierke in the context of nineteenth-century German constitutionalism see Ernst-Wolfgang Böckenförde,

In a lecture which Schmitt delivered in honor of Hugo Preuss on January 18, 1930, he rejected Gierke's attempts to place the state on such a level[48]. Schmitt noted that Gierke's disciple, Hugo Preuss, similarly stressed the equality of all associations, among which the state was only one association. But, Schmitt continued, Preuss did not conceive of the state in an entirely pluralistic sense. He understood it to represent national unity and therefore it still remained the decisive entity[49].

The culmination of the organic theory of the state found expression in G. D. H. Cole's and Laski's theory of pluralism. Despite the fact that neither Cole's nor Laski's understanding of pluralism was well known in Weimar Germany, a case study may be made by showing the extreme consequences of pluralism in Weimar. In tracing the changed nature of the state Schmitt observed that in the seventeenth century the sovereign state was the *magnus homo*[50]. The crucial point of Hobbes' construction of the theory of state, according to Schmitt, was his transfer to the *magnus homo* the Cartesian notion of man as mechanism with a soul[51]. Subsequently the personal element was gradually drawn into the mechanization process and drowned in it[52]. As a result the state slowly became a mere mechanism or apparatus devoid of almost all human qualities[53]. As an almost neutral apparatus the different political parties in Germany were able to draw upon the state's services for their particular ends[54], and as such the traditional national sovereign state as the realm of objective reason became the victim of partial interests[55].

Die deutsche verfassungsgeschichtliche Forschung im 19. Jahrhundert: Zeitgebundene Fragestellungen und Leitbilder (Berlin: Duncker & Humblot, 1961), pp. 147 ff.

48 Carl Schmitt, *Hugo Preuss: Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre* (Tübingen: Verlag von J. C. B. Mohr [Paul Siebeck], 1930), p. 15.

49 *Ibid.*

50 Carl Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes: Sinn und Fehlschlag eines politischen Symbols* (Hamburg: Hanseatische Verlagsanstalt, 1938), p. 99.

51 *Ibid.*, pp. 48—49.

52 *Ibid.*, p. 54.

53 *Ibid.*, p. 61.

54 *Ibid.*, p. 63.

55 Carl Schmitt, "Staatsethik und pluralistischer Staat" (1930), *Positionen und Begriffe . . .*, pp. 133—134.

Is Schmitt's notion of the state as a sphere of objective reason akin to Hegel's? No. The state for Hegel is "the march of God in the world . . ."[56], and "the Estates stand between the government in general on the one hand and the nation broken up into particulars (people and associations) on the other"[57]. Schmitt's understanding of the state as a sphere of objective reason is its capacity to distinguish friend from enemy, and the state's ability not to succumb to civil society and as such to serve the entire nation rather than just sections of it.

In reflecting upon the nature of states in 1931 he observed that only strong states can afford to be liberal democracies[58]. Such states, he implied, can permit themselves the luxury of tolerating opposition parties. By implication, therefore, weak states must be authoritarian to be able to distinguish friend from enemy and assure domestic order. Schmitt inferred in his writings that the condition of his acceptance of certain political parties and parliament would be, as in the case of Donoso Cortés, that they be subordinate to the sovereign — in the case of Weimar, the popularly elected president — and united with the sovereign in seeking the solutions necessary for the welfare of the entire society rather than just sections of it.

Only in the context of rescuing the remnants of the Weimar state from the onslaught of the various political parties may one understand his polemics against Laski's pluralism. Schmitt specifically attacked Laski's attempt to debase the state as the highest political entity by permitting individuals to have a plurality of loyalties[59]. According to Laski's theory of pluralism the individual may be linked

> to a variety of associations to which his personality attracts him. You must on this view admit that the State is only one of the associations to which he happens to belong, and give it exactly that pre-eminence — and no more — to which on the particular occasion of conflict, its possibly superior moral claim will entitle it[60].

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[56] J. W. F. Hegel, *Philosophy of Right* (Translated with notes by T. M. Knox; Oxford: At the Clarendon Press, 1953). Addition to paragraph 258, p. 279.

[57] *Ibid.*, paragraph 302, p. 197.

[58] Carl Schmitt, "Franz Blei," *Frankfurter Zeitung*, March 22, 1931.

[59] *BP*, p. 29.

[60] Harold J. Laski, *Studies in the Problem of Sovereignty* (New Haven: Yale University Press, 1917), p. 19.

Schmitt attacked this theory on the ground that it denied the sovereign nature of the state[61]. Faced with pluralist attacks Schmitt reasserted the monistic theory by endowing the state with the *summa potestas.*

Although sovereignty is essentially a political concept, according to Schmitt, he complained that while Laski constantly spoke about the state, politics, sovereignty and the government in *Studies in the Problem of Sovereignty* (1917), *Authority in the Modern State* (1919), *The Foundations of Sovereignty* (1921) and *A Grammar of Politics* (1925), nowhere did he at any time describe the meaning of politics[62]. Why? The view of one Laski commentator is that in the period between 1914 and 1925 it was Laski's

> desire to prevent the force of the state from being concentrated at any single point within it.... [This] leads him to attack the idea of the state's sovereignty; he wants to see power split up, divided, set against itself, and thrown widespread among men by various devices of decentralization, and he wants to be certain that the civil, economic, and social rights of individuals and groups are ensured against the encroachments of those who exercise power[63].

But further on we learn Laski's reason. He would not have been averse "to a strong, or even sovereign state", according to this Laski commentator, if the labor movement were to cease being "a minority group struggling against the power of a hostile behemoth..."[64]. It is clear, therefore, that Laski's aim was to minimize bourgeois political influence as long as the bourgeoisie remained in power. Of interest to note, however, is that Schmitt included in the list of books Laski's *A Grammar of Politics* (1925), in which Laski defined the state as "an organization for enabling the mass of men to realize social good on the largest possible scale"[65]. Hence we are confronted with a shift in Laski's view, namely, his adoption of a more positive attitude toward the state by assigning to it a greater central role.

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[61] *BP*, pp. 28—29.

[62] *Ibid.*, p. 28.

[63] Herbert A. Deane, *The Political Ideas of Harold J. Laski* (New York: Columbia University Press, 1958), p. 17.

[64] *Ibid.*, pp. 19, 20.

[65] Harold J. Laski, *A Grammar of Politics* (London: E. George Allen and Unwin, 1925), p. 25. During the 1930's Laski rejected the doctrine of pluralism altogether.

Why did Schmitt attack Laski's theory of pluralism in 1927, despite the fact that by then Laski could no longer be called a pluralist? Laski's theory was only one of a number of pretexts for Schmitt's essay on politics. Therefore the lapse of time — between Laski's pluralist outlook and his post-pluralist attitude — was of no concern in Schmitt's primary aim: to attack the pluralist denial of the superiority of the state.

The nature of the state which emerges thus far, as a result of Schmitt's polemics against Kelsen's normativism and Laski's pluralism, and Schmitt's criterion of politics, is monistic: the state as the decisive entity must stand above all other entities. But this kind of state cannot exist without a sovereign. Schmitt's sovereign has many of Bodin's attributes, for example, sovereign power that is highest, indivisible and absolute. The crucial difference between Bodin and Schmitt is that Schmitt does not advance dynastic arguments, and reflects Hobbes' influence. The difference between Hobbes and Schmitt is that the former does not conceive the state to be a sphere of objective reason entirely[66]. (Hobbes' thinking is quite systematic and is neither historical nor philosophy of history.) Here Schmitt comes nearer to Hegel, with the major exception that Schmitt does not adopt Hegel's system, nor does he entertain the assumption that reason unfolds in history and that history has a universal goal. Schmitt limits his horizon to his own epoch, that of the European national sovereign state which is a realm of objective reason that put an end to the religious wars.

One irrational element appeared in Schmitt's otherwise quite rational argument for the necessity of a strong German state. In his attack on pluralism's influence in Germany, and an earlier (1923) implied attack on the Marxist-Leninist inevitability theory of a one world system[67], Schmitt introduced the concept of the myth. Of interest to note here is his debt to Georges Sorel. But Schmitt's distaste for the "general strike," and Sorel's Marxist interpretation in general led him to reject Sorel's myth of the proletariat. Instead, he made the point that in a conflict between national feelings — the state as the God — and the

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[66] Were one to employ Hegel's terminology then we could safely say that Hobbes' state is not concerned with the realization of a universal idea, but is mainly concerned with the safeguarding of the individual's "subjective particularity."

[67] *GGL*, pp. 53 ff.

proletarian image of the bourgeois class, the former is victorious[68]. The state as an organ has a much more forceful mythical attraction to most people, according to him, than any kind of international movement. To support his point Schmitt pointed to Mussolini's victory in Italy, and stated that Mussolini, by having created a strong national state, showed that the myth of the proletariat is ineffective[69].

Chapter III

The Meaning of Democracy and Liberalism

In the previous chapter chronology was sacrificed for systematic continuity. Now we must return to the crisis year 1923. This will be followed by the relatively calm years between 1924 and 1929. Both, the Communists and the Nazis, lost heavily in the election of December 1924. According to Halperin, the decline of the two extremist groups was proof of the change that had come over the German economic scene[1]. Since Weimar's birth and throughout its entire existence there were many political parties which did not accept the new democratic system, nor did all those elements that were against democratic legitimacy favor a return to monarchical legitimacy. Neither the Communists nor the National Socialists were interested in either of these alternatives. Even many Socialists considered the republic only a means to an end. Their favorite slogan was:

Republik, das ist nicht viel,
Sozialismus ist das Ziel[2].

By 1923 Schmitt had already begun to believe that comparative stability could not be assured in Germany for any length of time because large segments of the population were either apathetic toward or actively opposed to the Weimar system. To find the healthy characteristics of Weimar, Schmitt began to explore the nature of its constitution from the viewpoint of the political ideas contained in it. Hence in a hastily written essay in 1923[3] Schmitt asked whether the constitution was a consistent document. In searching for the answer he concluded that it contained two distinct ideas, one of which was democratic and the other liberal.

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[1] S. William Halperin, *Germany Tried Democracy* (New York: W. W. Norton & Company, Inc., 1965), p. 308.

[2] Although this slogan originated with E. Bernstein, the Social Democrats, in general, were not against the republic.

[3] *GGL.*

1. The Criteria of Democracy: Identity and Homogeneity

Schmitt observed that the political aim of democracy in the nineteenth century was polemical in so far as it was anti-monarchical: the sovereignty of the people against the sovereignty of the monarch. Once democracy lost its enemy, the king, then it became clear, according to Schmitt, that its political aim had vanished[4].

Were one to eliminate the emasculated sense of democracy as understood in the nineteenth century then, in Schmitt's view, one could conclude that the basic criterion of democracy is the identity between ruler and ruled (an old Aristotelian formula), and thereby law and the will of the people are equated (Rousseau's formula). By following essentially Rousseau's views on the topic Schmitt stated that it was Rousseau's belief that citizens agreed even to those laws which were enacted against their will, because law is the *volonté générale*[5]. If this were combined with Rousseau's argument that the general will is in accord with true freedom then, according to Schmitt, this may easily result in the logical conclusion drawn by the Jacobins that a minority may rule over the majority in the name of democracy. "The central point of the democratic principle remains intact, namely, the assertion of an identity of law and the will of the people . . .[6]." Consequently, Schmitt concluded, there is nothing incompatible between democracy and dictatorship[7], because the essence of democracy is identity, and not necessarily liberty. In Schmitt's construction the antithesis of dictatorship is discussion and not democracy.

Schmitt touched upon this topic again in a preface to the new edition of the *Geistesgeschichtliche Lage des heutigen Parlamentarismus* in 1926. Whereas previously he confined his remarks to the identity between ruler and ruled, etc., they now centered mainly on physical and moral qualities. Schmitt was strongly impressed by the then actual problem of minorities in Central and Eastern Europe, especially the Greek-Turkish population exchange[8]. In relying on classical practice he argued that homogeneity, and if necessary, "the excision or destruc-

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[4] *Ibid.*, p. 12.

[5] *Ibid.*, p. 14.

[6] *Ibid.*

[7] *Ibid.*, p. 17.

[8] *GGL* (1926), p. 14; see also *V*, p. 232.

tion of the heterogeneous"[9] elements are decisive factors for any true democracy, for "the democratic concept of equality is a political one which takes cognizance, as any genuine political concept [does], of the possibility of distinguishing friend from enemy[10]."

> The political strength of a democracy may be seen when it knows how to do away or keep at a distance the strange *(das Fremde)* and unequal, [that] which threatens homogeneity .... It [homogeneity] can be found in certain physical and moral qualities, for example, in the citizenry's excellence, ἀρετή , the virtus *(vertu)* of classical democracy. English sectarian democracy of the seventeenth century is based on common religious convictions. Since the nineteenth century it has consisted mainly in belonging to a definite nation, in national homogeneity[11].

After having established for himself what he considered to be the true elements of democracy Schmitt proceeded to analyze the Weimar constitution as to its democratic content. In this context he noted the existence of a kind of identity between ruler and ruled, and pointed to the constitutional provisions for popular initiative and referendum[12]. Both of these practices, said Schmitt, are in accordance with direct or pure democracy. The difference between the two is that the former takes place before a law is passed, *ante legem,* while the latter is *post legem*[13].

Of specific interest to Schmitt was Article 73 section 3, for, according to this section, the people may assume the role of the lawgiver.

> A popular vote shall further be resorted to when one-tenth of the qualified voters ... initiate a petition. Such a petition must be accompanied by a fully elaborated bill. The government shall submit the bill together with a statement of its attitude to the Reichstag. The popular vote does not take place if the desired bill is enacted without amendment by the Reichstag[14].

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[9] *GGL* (1926), p. 14.

[10] *V*, p. 227.

[11] *GGL* (1926), p. 14.

[12] Schmitt called this to the attention of a number of jurists in a lecture he delivered to the Jurist Society in Berlin on December 11, 1926. Subsequently he developed this lecture further and published it in book form. Carl Schmitt, *Volksentscheid und Volksbegehren: Ein Beitrag zur Auslegung der Weimarer Verfassung und zur Lehre von der unmittelbaren Demokratie* (Berlin: Walter de Gruyter, 1927). Hereafter: *VV*.

[13] *Ibid.*, p. 7.

[14] F. Giese, *Die Reichsverfassung vom 11. August 1919* (6th ed.; Berlin: Carl Heymanns Verlag, 1925), p. 215.

Schmitt observed that the "popular initiative is geared ... to a popular decision ...[15]." However, this happened only if the popularly desired bill was not accepted in its entirety by the Reichstag. Thus, next to the normal procedure of lawgiving by Reichstag resolutions under Article 68, the constitution also provided for an extraordinary procedure which was the result of the "relationship between popular initiative and popular decision ...[16]." For lack of a better term, Schmitt called this "popular lawgiving procedure *(Volksgesetzgebungsverfahren)*[17]."

This procedure only bordered on a true democracy, according to Schmitt, because initiatives in the Weimar constitutional sense meant nothing more than a few people drafting the desired law, submitting it to at least one-tenth of the people, waiting for their answer, and, if they approved, forwarding it to the government. In a democracy all can participate in the deliberation of drafting the law[18], but, he added, this is impossible in a country as large as Germany[19]. For this reason it is essential that the popularly elected president be permitted to submit to the people precisely phrased questions[20] (the Weimar constitution did not permit the president to submit questions directly to the people) in order for them to be able to acclaim properly. No form of state, in Schmitt's view, could forego the practice of acclamation, and he was not adverse to the idea of reviving in a modified form the classical procedure.

> The people acclaim a leader, the army (here identical with the people) [acclaims] the commander in chief or imperator .... [The people] acclaim or reject, rejoice or growl ... [they] say ... 'amen' regarding a decision ... or refuse by remaining silent[21].

Although every citizen can participate in drafting laws in a democracy, Schmitt pointed out that even the Weimar constitution excluded certain questions from the popular lawgiving procedure. This exclusion,

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15 *VV*, p. 10.

16 *Ibid.*

17 *Ibid.*, pp. 10, 14.

18 *Ibid.*, pp. 38—39.

19 *Ibid.*, p. 42.

20 *Ibid.*, pp. 36 ff. Schmitt is here rather vague on what constitutes a well phrased question.

21 *Ibid.*, p. 34.

he maintained, is in accordance with the democratic principle. Article 73 section 4, for example, did not permit initiatives to take place on the following items: (a) the budget, (b) tax laws, and (c) laws relating to the classification and payment of public officers[22]. Schmitt observed that although this section included a wide variety of matters, it would be more appropriate to say that all laws pertaining to money *(Geldgesetze)* were not subject for popular decisions[23]. There are matters, said Schmitt, which are appropriate for such decisions, but not suited for popular initiative, and vice-versa[24]. Here he was obviously influenced by Rousseau's dislike of questions pertaining to finance. "The word 'finance,'" said Rousseau, "is a slavish word . . .[25]." According to Schmitt,

> When a people express themselves directly as a mass they can make known their opinion on every proposition, without mistakenly creating the impression that they want to play [the role] of the scientific technical expert[26].

In Schmitt's view, what sort of legislation can the people initiate? He argued that the actual purpose of an initiative, from the viewpoint of the Weimar constitution, was to draft general laws only[27]. Here he agreed with Rousseau who maintained that the people can pass upon general laws solely, and must avoid the *objet individuel*. Says Rousseau: "When I say that the object of laws is always general, I mean that law considers subjects *en masse* and actions in the abstract, and never a particular person or action[28]." Not only were the enumerated items excluded from the people's initiative, Schmitt argued, but, according to the general meaning of this article, the whole realm of the government and administrative apparatus was excluded as well[29].

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[22] Article 73 section 4 states that: "Only by authority of the Reichspresident may a popular vote be taken on the budget, tax laws, and laws relating to the classification and payment of public officers." Giese, *Die Reichsverfassung vom 11. August 1919*, p. 215. See also: "Gesetz über den Volksentscheid" of June 27, 1921. *Reichsgesetzblatt*, No. 68, pp. 790 ff.

[23] *VV*, pp. 22, 23.

[24] *Ibid.*, p. 15.

[25] J. J. Rousseau, "The Social Contract," *The Social Contract and Discourses* (Translation and introduction by G. D. H. Cole; New York: E. P. Dutton and Company, Inc., 1950), p. 93.

[26] *VV*, p. 35.

[27] *Ibid.*, p. 45.

[28] Rousseau, "The Social Contract," p. 35.

[29] *VV*, pp. 44—45.

According to Schmitt's previous interpretation of Article 48, the president during a state of exception could only undertake measures but not give laws. The people, on the other hand, could only give laws but could not undertake measures. Now Schmitt deviated from his previous position by permitting the president to do both — not only in exceptional times but also during normal periods.

Can the amorphous people, in Schmitt's opinion, will a new constitution into existence at any given moment? In the context of the Weimar constitution he stated that a people cannot themselves ask certain questions (i. e., legislation concerning governmental and administrative matters), but can only answer questions that have been submitted by the government[30]. From this he also inferred that the people cannot initiate legislation pertaining to a new constitution or to the basic nature of the existing one, for this would imply that the initiating minority could pose the actual question and overrule the democratic government. Hence it may be stated that in Schmitt's construction the people are either omnipotent in so far as they decide in the last instance by their "yes" or "no," or powerless because of their absolute dependence on whether the properly phrased question is asked. This is in sharp contrast to Rousseau's conclusion in the *Social Contract* which ignores the question-answer problem.

This type of democracy must be understood in Robespierre's interpretation of Rousseau's concept of the "general will." Robespierre argued that because of the people's lack of enlightenment they could not be trusted to voice their real will[31]. Because of Schmitt's conviction about the evil and dangerous nature of man, he did not believe that the people could, in the foreseeable future, be educated to govern themselves. In other words, the democratic general will in Schmitt is a combination of the power of a man or a minority to ask the people a question and the peoples' right to answer. But this is a perversion of a true democracy, because of the dependence of the people on the

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30 *Ibid.*, p. 35.

31 Jacob L. Talmon, *The Origins of Totalitarian Democracy* (London: Secker & Warburg, 1955), p. 106. In mentioning that Italy had abandoned the liberal methods of election, Schmitt stated that there is nothing incongruous between plebiscites and democracy. See Schmitt's book review of Erwin von Beckerath's "Wesen und Werden des faschistischen Staates" (1929), *Positionen und Begriffe im Kampf mit Weimar — Genf — Versailles 1923—1939* (Hamburg: Hanseatische Verlagsanstalt, 1940), p. 111.

question being asked. Professor Smend correctly observed that Schmitt's understanding of democracy is "antique[32]." The exclusive right to ask the question that Schmitt attributes to the government has its origin in ancient Sparta, and the practice was also known in the Roman republic — the *jus rogandi*. But, on the other hand, the introduction of the question-answer method is very modern and belongs to a plebiscitarian mass democracy.

2. The Criteria of Liberalism: Discussion and Parliamentarianism

Liberalism has three aspects to it: the philosophical, economic, and political. The first rests upon the general Stoic belief that all men are equal — unlike the democratic view which recognizes only citizens as equal. The economic aspect is found in the theory of *laissez faire*. And the general political meaning of liberalism is embodied in the writings of Locke, Montesquieu, and J. S. Mill, among others. Respectively, they stress the belief that government exists for the well being of the people, that power must be checked by power, and the belief in freedom of speech.

In Schmitt's view the essence of political liberalism is not the identity of ruler and ruled or law and the will of the people, nor any other kind of identity, but public debate, the separation of powers, and the enactment of laws as a result of free parliamentary discussions[33]. He noted in this context that in the fight between popular representation and monarchical rule one referred to a popular executive as a parliamentary government, and this, of course, assumes the existence of parliament[34]. Proceeding with his observations he accepted Guizot's three characteristics of parliamentarianism which he outlined in the nineteenth century: (1) discussion, (2) public parliamentary debate, and (3) freedom of the press[35]. Schmitt utilized these categories in analyzing the parliamentary situation in Weimar. A point emphasized by Schmitt was that the historical process is not static, and questions of the present cannot be replied to with answers of the past (see Introduction). But in his discussion of the Weimar parliament he did

[32] Rudolf Smend, *Verfassung und Verfassungsrecht* (München: Duncker & Humblot, 1928), p. 68.

[33] *GGL* (1923), pp. 27 ff.

[34] *Ibid.*, pp. 20—21.

[35] *Ibid.*, pp. 23—24.

exactly this. According to him, the parliamentary system had lost its *raison d'être* in our century because the three characteristics of parliamentarianism were no longer in operation.

The reason for the absence of these characteristics must be sought in the changed nature of the political parties. Weber observed that parties in the nineteenth century rested upon the belief in free recruitment and winning of voters[36]. Another striking point of the structure of political parties then was the lack of tight cohesion. Moreover, a parliamentary representative did not necessarily belong to a political party, and he was, therefore, independent of party ties. However, the nature of political parties changed profoundly. The Catholic Center and the Social Democrats were *Weltanschauung* parties even before 1919, and became the main components of the Weimar coalition. The new parties, the Communist and the National Socialist, were well organized and tightly centralized political forces. Hence, referring to the workings of parliament, Schmitt noted, in 1923, that ever "smaller and smaller committees of parties or party coalitions decided behind closed doors ... the fate of millions of people ...[37]." He reiterated this view in 1926. In the new foreword to the second edition of *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* he stated that one may speak of genuine parliamentarianism only as long as public parliamentary discussion is taken seriously[38]. "All ... parliamentary establishments and norms receive ... their meaning through discussion and public parliamentary debate[39]."

But in this age of mass democracy, which came about mainly as a result of the extension of the franchise, and, in turn, aided the development of strict party discipline, public discussion, in Schmitt's view, had become an empty formula.

> Political parties, no longer concerning themselves with discussion, now appear as social or economic power groups facing each other, calculating ... the interests and power possibilities and [then] deciding ... on compromises and coalitions[40].

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[36] Max Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie* (4th ed.; Edited by Johannes Winckelman; Tübingen: J. C. B. Mohr [Paul Siebeck], 1956), 1. Halbband, p. 167.

[37] *GGL* (1923), p. 39.

[38] *Ibid.* (1926), p. 9.

[39] *Ibid.*, p. 7.

[40] *Ibid.*, p. 11.

With the ideological dismissal of the institution of the Weimar parliament, Schmitt searched for the liberal elements contained in the constitution which could substantiate his thesis of the spiritual bankruptcy of the Weimar parliament. For our purpose only two articles are of interest — 21 and 29. Schmitt pointed out that the wording of Article 21 is not in accord with twentieth-century practice. It states that

> The representatives represent the whole people. They are subject only to their conscience and are not bound by any instructions[41].

Moreover, the spiritual basis of parliament was also safeguarded in Article 29 sentence 1:

> The proceedings of the Reichstag are public[42].

Tight party cohesion, whereby the representatives owed their allegiance to the political party, Schmitt argued, made public proceedings farcical because important decisions were arrived at behind closed doors. According to Schmitt, parliament was no longer the place where political decisions were made. "The essential decisions are made outside parliament[43]."

His criticisms of parliamentarianism concerned also the axis of the Weimar juristic system: the Weimar state as a *Rechtsstaat* in the sense of a *Gesetzesstaat* (lawgiving state). In this type of state the lawgiver has the last word and the lawgiver is parliament. Also the constitution itself was law, juristically speaking, and could be revised by way of law — Article 76.

Schmitt asked the question which may be appropriately phrased as follows: To what extent can the constitution be amended by way of Article 76? According to this article

> The constitution may be amended by way of legislation. But acts of the Reichstag relating to the amendment of the constitution are valid only when two-thirds of the members are present and at least two-thirds present assent. Also acts of the Reichsrat relating to the amendment of the constitution require a two-thirds majority of all votes cast . . .[44].

The opinion of the leading commentators of the Weimar constitution, Anschütz and Giese, leading jurists such as Richard Thoma, and in

[41] Giese, *Die Reichsverfassung vom 11. August 1919*, p. 108.

[42] *Ibid.*, p. 122.

[43] *V*, p. 319.

[44] Giese, *Die Reichsverfassung vom 11. August 1919*, pp. 224—225.

general the prevailing attitude was that the constitution may be amended to any extent under this article. For instance Article 1 section 1 that "the German Reich is a republic"[45] could, in accordance with the dominant opinion, be changed by way of Article 76 to read that Germany is a monarchy or a Soviet republic. Schmitt maintained, on the other hand, that section 1 of Article 1 could not be amended by making use of Article 76, for to do so would result in the destruction of the entire constitution[46], and Schmitt argued that it is essential to distinguish between amending and destroying a constitution. The only amendments that may be passed under Article 76, according to Schmitt, related to one or a few constitutional provisions only. No amendment may ever endanger the basic republican concept, to wit, that the identity and continuity of the constitution remain intact as a whole[47]. In replying to this interpretation of the constitution Anschütz stated that the theory advanced that there were limits which may not be transgressed by way of Article 76 was a "novel theory[48]." He pointed out that "the constitution ... does not stand above the legislature, but is at its disposal[49]." According to Richard Thoma the Reich's legislature "possesses an unlimited competence, a *plenitudo potestatis* for constitutional change." Neither "enthusiasm nor fear" can change the correctness of this interpretation[50].

Schmitt's arguments were aimed at destroying the purely mechanical approach to parliamentarianism, namely, that any qualified majority may at any moment decide on the nature of the constitution itself. By noting the composition of the Weimar parliament this could very well have meant that it was possible to have a republican form of government one day, monarchical the next, socialist on the following, and culminating, finally in either a Communist or National-Socialist form. Against this purely procedural approach Schmitt advanced the thesis that only the people, the *pouvoir constituant*, may make the decision about the kind of constitution they desired.

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45 *Ibid.*, p. 48.

46 *V*, p. 104.

47 *Ibid.*, p. 103.

48 G. Anschütz, *Kommentar zur Reichsverfassung* (14th ed.; 1932), pp. 404 ff.

49 G. Anschütz, *Die Verfassung des Deutschen Reichs vom 11. August 1919* (11th ed.; Berlin: Verlag von Georg Stilke, 1929), pp. 351—352.

50 Richard Thoma, "Die Funktionen der Staatsgewalt." *Handbuch des Deutschen Staatsrechts* (Edited by G. Anschütz and R. Thoma; Tübingen: Verlag von J. C. B. Mohr [Paul Siebeck], 1932), Vol. II, p. 154.

Superficially Schmitt's argument appears to contradict his ideological one in which he advocated democratic ideas at the expense of liberal ones. In his pleas regarding Article 76 in relation to Article 1 he argued for saving the constitution. Though this is not exactly the case in the context of his writings in general, his interpretation, nevertheless, had a profound impact on the drafting of the Bonn constitution (see Conclusion).

Why then was Schmitt suddenly defending the constitution? In doing so he had hoped to counteract the ever present possibility of extremist parties sliding into power legally and thereby changing the constitution's basic meaning by way of Article 76. Although Schmitt himself was not much concerned about the republican form of government, he wanted to prevent any challenge to the powers of the popularly elected president for, in his view, the president, in conjunction with the officialdom and army, formed a realm of objective reason in the sense that they were interested in the entire nation and not just sections of it. In other words, since the constitution was in the process of being abused by the various extreme parties, Schmitt preferred that it be violated by the president — the least radical of the extreme alternatives. Since we find as yet no concrete suggestions as to how the state which Schmitt had in mind could be brought about, his discussion of democracy and liberalism is therefore almost purely ideological.

Against a purely mechanical legal system as expressed by the parliamentary voting procedures, Schmitt tried to construct a legitimate form of government in which the president would have found his *raison d'être* in the peoples' desire for a strong leader as expressed in the form of plebiscites. Schmitt's reason for advancing this argument was to establish a government based mainly on legitimate rule by making legality a derivative of legitimacy — here Schmitt is indebted to Max Weber's classifications[51] — rather than making legality antithetical or even superior to legitimacy.

[51] It may be of interest to note that Max Weber had hoped to establish the Weimar republic along the principle of constitutionality based on the parliamentary lawgiving state, and on the plebiscitary principle in which the president would have played the role of a charismatic leader. Schmitt, as Wolfgang Mommsen observed in his study *Max Weber und die deutsche Politik 1890—1920* (Tübingen: J. C. B. Mohr [Paul Siebeck], 1959, p. 383), did not take the first principle into consideration, but stressed the second. Mommsen is correct on the first point, but only partially so on the second. Although Schmitt spoke of the president being the leader of the German people, he did not imply that the president had to possess charismatic qualities.

Due to Schmitt's Catholic heritage and his unhesitating endorsement of the Catholic church in the early 1920's, and because of his views on democracy and the presidency of Weimar, Richard Thoma advanced the suggestion that it is Schmitt's unspoken personal conviction that to restore order Schmitt hoped to achieve an alliance between the dictator — the president — and the Catholic church[52]. This is indeed plausible, for Schmitt pointed out that the Church represents the *civitas humana* and Christ[53]. Representation also implies the exercise of personal power[54], and this authority is embodied in the pope[55]. An alliance between the pope and a directly elected president in whose hands power would reside was within the realm of possibility in the context of Schmitt's writings. Furthermore, it cannot be denied that Schmitt looked to Rome during these years. But it is somewhat far fetched to conclude that Schmitt saw the solution of the German tragedy solely in an alliance with the Vatican. There is no doubt that the Catholic church exerted a strong influence in Germany through the Center party — but it was only a party and not the state; and Schmitt was enough of a realist to recognize that the restoration of order and discipline could not depend only on a concordat. He had few illusions about the general secularization of modern life. As early as 1922 he stated that: "Alle prägnanten Begriffe der modernen Staatslehre sind *säkularisierte* theologische Begriffe[56]."

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[52] Richard Thoma, "Zur Ideologie des Parlamentarismus und der Diktatur," *Archiv für Sozialwissenschaft und Sozialpolitik*, Vol. 53, Heft 1, 1925, p. 217.

[53] *RK* (1923), pp. 39—40.

[54] *Ibid.*, p. 44.

[55] *Ibid.*, p. 30.

[56] *PT*, p. 49. Italics mine.

Modern History as a Process of Neutralization: A Discourse

Between 1921 and 1929 Schmitt wrote more than once on subjects more ideological in nature than juristic. This was mainly due, according to him, to the relatively calm period in Weimar (especially since 1924), and his being far removed from the political scene, Berlin. A new period began for him in 1930, the year following his arrival in the capital. After the Wall Street crash he joined Johannes Popitz and the Reichswehr officers of the Schleicher entourage, such as Erich Marcks and Eugen Ott, with the aim of averting the possibility of an extremist party gaining power by legal or illegal means. In this crisis atmosphere Schmitt developed to a great extent the idea of the presidial system as an alternative to what he believed to be a bankrupt and impotent parliamentary system.

From his writings in general, so far, we have noted that he did not care much for the republican form of government. He shared the belief, widespread at the time in Germany, that the Weimar constitution in its original form was not an appropriate document for a country without a solid liberal-democratic tradition, and therefore he did not believe that in the face of continued crises in Germany this document could be saved in its entirety. Schmitt's pessimism vis-à-vis the Weimar constitution as a whole is also not surprising in view of his strong religious and to a large extent anti-liberal intellectual heritage. The discourse on neutralization is a convenient mark to separate Schmitt's partly ideological approach from his more pragmatic one after the Wall Street crash.

In a lecture delivered on October 12, 1929, at Barcelona[1], Schmitt outlined the general course of history since the sixteenth century, and maintained that it reflected an intensified process of neutralization from theology to technology. Because of its religious wars he called the sixteenth century a century of theology. This century was followed by the seventeenth or metaphysical and scientific century which was,

[1] Carl Schmitt, "Das Zeitalter der Neutralisierung und Entpolitisierung" (1929), *Positionen und Begriffe im Kampf mit Weimar — Genf — Versailles 1923—1939* (Hamburg: Hanseatische Verlagsanstalt, 1940).

in Schmitt's opinion, the heroic age of occidental rationalism for it encompassed, simultaneously, such thinkers as Suárez, Bacon, Galileo, Kepler, Descartes, Grotius, Hobbes, Spinoza, Pascal, Leibniz and Newton. The eighteenth century he referred to as one which vulgarized the previous one. The "specific pathos of the eighteenth century [was] that of 'morality' *(Tugend)*, and its mythical word [was Montesquieu's and especially Rousseau's] 'vertu.'" Moreover, in the Kantian concept God was no more than a "'parasite of ethics.'" The nineteenth century was the economic century. Production and consumption became the central human categories. Our own, the twentieth, Schmitt characterized as an age in which the technical sciences predominate. In the nineteenth century, Schmitt argued, the technical sciences were closely related to the general economic development and so the two, technical science and economic development, often marched under the same banner, namely, industrialism[2].

Returning for a moment to the sixteenth century, Schmitt asserted that the European people, exhausted by civil wars that were incited by theologians, searched for a neutral area in which theological disputes would cease and thereby enable the different segments of society to come to an understanding. This was achieved when Christian theology was superseded by a "'natural' system of theology, metaphysics, moral [philosophy] and jurisprudence[3]."

> The theological concepts that were developed over many hundreds of years suddenly became uninteresting and [a matter of] private conviction. God was put aside *(herausgesetzt)* in the metaphysics of eighteenth-century deism, and vis-à-vis the struggles ... of actual life [He became] a neutral instance[4].

For this reason, the former center of gravity, namely, Christian theology, ceased to be so. But when one sphere was neutralized another became the center of tension. That is why, said Schmitt, in the nineteenth century we witnessed the neutralization, first of the monarch, and then of the state. In neutralizing and banishing the political sphere, liberalism, according to Schmitt, achieved its aim, namely, the "pouvoir neutre and the neutral state ...[5]." But then the realm of economics became the center of new tensions, namely, the battlefield of class struggle.

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[2] *Ibid.*, pp. 123—124.

[3] *Ibid.*, p. 127.

[4] *Ibid.*, p. 128.

[5] *Ibid.*

European society thought that it had finally found an absolutely neutral sphere in the technical sciences[6], for the technical sciences were supposed to serve everybody without any prejudice. Schmitt, in keeping with his friend-enemy criterion of politics, said that it remained to be seen, however, which political power would utilize the new technical sciences in order to define friend and enemy anew[7], and, accordingly, would have an edge over those states which declined to do so. The technical realm, Schmitt maintained, must not be considered an everlastingly neutral sphere or a realm of eternal peace[8]. Technical progress is not identical with moral progress, and the battle of a new friend-enemy distinction is taking place in which technical arms and weapons serve friend and enemy without any moral distinction.

Schmitt's aim in this discourse was to draw attention to the last five centuries and point out the inability of human beings to escape political conflict. The argument centered mainly on his belief in the non-existence of an absolutely neutral sphere in which mankind could find eternal peace. We gather that every sphere of human existence can potentially become political. This discourse must therefore be approached from his friend-enemy distinction. He implied that it was a mistake to believe that the friend-enemy category could be banished by always escaping into new regions.

Schmitt's thesis that every sphere can potentially become political is also implicitly aimed at destroying the Marxist-Leninist hope of bringing about a universal Communist society. When the state is eliminated, the political sphere, they argue, will one day vanish. It must be remembered, however, that the type of man to emerge in the Communist millenium, according to Communist teachings, will be a new type of man and then, of course, political problems in the sense of the friend-enemy distinction may become a thing of the past.

But returning to the epoch of the national sovereign state, where man is still what he is, we note here a fallacious insinuation on Schmitt's part, namely, that liberal-democratic states ignore the ever present possibility of conflict. He was under the impression that because the state as the highest political entity had been debased by

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6 *Ibid.*

7 *Ibid.*, p. 131.

8 *Ibid.*, p. 129.

legal and political theorists, therefore it, the state, was so in practice. In so far as Weimar was concerned Schmitt was correct because Germany as a national sovereign state received a heavy blow at Versailles. Weimar Germany proved powerless to assert itself in international politics, and at home the state was often at the mercy of the political parties.

Schmitt's short discourse must not be construed as an attempt to build a universal philosophical historical system. He is time bound to the epoch of the modern national sovereign state which began to emerge in the sixteenth century. Also valid in this context is his belief in the uniqueness of historical events. Such vast scale historical pictures ceased as soon as Schmitt was confronted in Berlin with the crisis situation emerging in the winter 1929—1930. Then new concrete constitutional problems arose. In January 1930 Schmitt, in his Hugo Preuss discourse, uttered a Cassandra diagnosis:

> ... the fate of the German intelligentsia and education will ... be identical with the fate of the Weimar constitution[9].

[9] Carl Schmitt, *Hugo Preuss: Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre* (Tübingen: Verlag von J. C. B. Mohr [Paul Siebeck], 1930), p. 25.

Chapter IV

The Meaning of the Presidial System

The Wall Street crash ushered in the final stage of Weimar's existence. Besides the disruptive effect of some political parties which aimed at acquiring power in order to implement their partial will, Schmitt, in 1929, also mentioned the polycratic and federal elements as constituting a disintegrating effect upon the state. It was in this atmosphere of rapid decline that Schmitt developed his notion of the presidial system as an alternative to a Nazi or Communist victory.

Schmitt constantly emphasized the importance of the state's capacity of standing apart from society, for it must serve all of society instead of egoistic forces within society. But the state as a political entity had, he maintained, become a mere arm for the various political parties, and hence the state could no longer serve common interests. For a state to be a true state it must not only serve all of society, but the goal of true political leadership should be, according to Schmitt, to serve higher interests, rather than narrow party concerns[1].

1. General Background: Tendencies Toward a Total State

In discussing the nature of some political parties in Weimar, Schmitt objected to their totalitarian nature. Besides attempting to gain power, the *Weltanschauung* parties aimed at capturing the people's minds and indoctrinating them with the "right kind" of outlook. These parties, according to him,

> attempt to lay hold of the people and accompany them from the cradle to the bier, from the kindergarten to the athletic club and bowling alley down to the grave or crematorium in order to instill in their adherents the correct

[1] Carl Schmitt, *Der Hüter der Verfassung* (Tübingen: Verlag von J. C. B. Mohr [Paul Siebeck], 1931), p. 88. Hereafter: *HV. Der Hüter der Verfassung* appeared first as a short essay in 1929 in the *Archiv des öffentlichen Rechts*, Neue Folge, Band 16, Heft 2.

Weltanschauung .... And as such they totally politicize [in different directions] the German people and their unity becomes completely divided[2].

Schmitt also pointed out that these parties challenge the most significant monopoly of the state, namely its capacity to draw the distinction between friend and enemy[3]. By so doing the parties (the term is derived from "part") not only negate the state, the whole, but actually claim to represent the true whole. In viewing it from this aspect Schmitt noted after World War II that there can really be no totalitarian states in the strict sense of the word, "but only totalitarian parties[4]."

Because of the disintegrating effects which the various *Weltanschauung* parties had in Weimar Germany, Schmitt contrasted the nature of the German state with that of Mussolini's Italy. The former he designated a quantitative total state and the latter a qualitative total state. A quantitative total state is one in which, according to Schmitt, the government under the pressure of various parties interferes in all aspects of human existence. The state is actually compelled to do this in domestic politics as the nature of the coalition government is a reflection, to some extent, of a parliament torn by dissension. Rather than this being a sign of strength, it is in fact a sign of weakness, because the Weimar state, Schmitt continued, proved incapable of withstanding the overwhelming demands of the different parties[5].

The strength of the qualitative total state, on the other hand, is its capacity to resist effectively any claims being made on it by political parties. By not tolerating political opposition parties within its realm, the state guards its most cherished monopoly, namely the capacity to distinguish friend from enemy[6] in domestic and international politics. Moreover, a qualitative total state does not as a rule interfere in the private economic realm. But to assure order, peace and stability,

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[2] Carl Schmitt, "Weiterentwicklung des totalen Staats in Deutschland" (January 1933), *Positionen und Begriffe im Kampf mit Weimar — Genf — Versailles 1923—1939* (Hamburg: Hanseatische Verlagsanstalt, 1940), p. 187.

[3] *Ibid.*, p. 188.

[4] See Carl Schmitt's *Verfassungsrechtliche Aufsätze aus den Jahren 1924—1954: Materialien zu einer Verfassungslehre* (Berlin: Duncker & Humblot, 1958), p. 366.

[5] Carl Schmitt, "Weiterentwicklung des totalen Staats in Deutschland" (January 1933), *Positionen und Begriffe* ..., p. 187.

[6] *Ibid.*, p. 186.

the state cannot afford, in Schmitt's view, to leave the mail, mass media (i. e., radio, films, etc.) and other public entities outside the sphere of its control[7].

In the instance of Germany, Schmitt singled out what Johannes Popitz called the polycratic elements as also having a decentralizing effect upon the state. Various legally recognized public entities (i. e., the Reichsbank, the post-office, the railroad system, among other bodies) were relatively free from state control in so far as questions of self administration and policy decisions were concerned[8]. The relative independence accorded to these bodies resulted, according to Schmitt, in "lack of unified direction, disorganization, and . . . planlessness . . .[9]."

Also criticized by Schmitt was the disintegrating effect which the federal element had in Weimar. The coexistence of a number of states within the larger framework, the Reich, could easily be endangered, Schmitt argued, whenever a number of parties that made up the coalition government at any given moment were federalist parties, for generally such parties have only very limited interests. Furthermore, Schmitt also observed the danger which exists if different political parties were in control of one or more states. These power groups could then be in a position to influence the policy of the entire Reich, and thus threaten the state from following policies in the interest of the entire nation[10].

Only in this context can we understand Schmitt's position at Leipzig when he argued in favor of the Reich's action on July 20, 1932, vis-à-vis Prussia. On that date Hindenburg suspended the Prussian government, which was composed of Social Democrats, the Center party and democrats, on the ground that it was incapable of insuring peace in the most powerful state in the Reich, and appointed v. Papen Commissioner of Prussia[11]. For Schmitt to have justified the Reich's action was in accord with his general desire to reduce any force which could hamper the state in its exercise of political power. This was especially true in time of crisis. Hence Schmitt's remark in the Supreme Court on October 17, 1932, that the Reich's action was not

[7] *Ibid.* See also "Starker Staat und gesunde Wirtschaft" (1932), *Volk und Reich*, Heft 2, 1933, pp. 89ff.

[8] *HV*, pp. 71, 106—107.

[9] *Ibid.*, p. 92.

[10] *Ibid.*, p. 95.

[11] For details of this event see Arnold Brecht's *Prelude to Silence* (New York: Oxford University Press, 1944), pp. 65 ff.

intended to destroy Prussia's existence, but to protect it against danger[12]. This approach was certainly consistent with Schmitt's understanding of commissarial dictatorship and the powers of the president according to Article 48 sections 1 and 2. In so far as section 2 was concerned the Supreme Court decided that the action of the Reich government was in accord with the Weimar constitution.

2. The Defender of the Constitution: The President

Against the general background of centrifugal tendencies, Schmitt outlined a way of overcoming the crisis. In Chapter I we discussed the nature of commissarial and sovereign dictatorship. These concepts may be mentioned here in illustrating Schmitt's short and long range aims. To restore order and peace immediately he favored a commissarial dictatorship. However, to insure continuous order, peace and unity, we note in Schmitt's writings strong sovereign dictatorial overtones, culminating finally in the sovereignty of the president; but as long as possible within the framework of the Weimar constitution, for it offered vast possibilities. Schmitt pointed out in 1928 that — except in the case of a cabinet tolerated by a negative majority in parliament — three different legal kinds of government are possible: (1) a chancellor-cabinet of a majority party, (2) a coalition-cabinet of different parties, and (3) a presidial-government[13] which, however, opens the way to a commissarial dictatorship.

The commissarial aspect came to the fore when Schmitt asked the question: Who could be the defender of the Weimar constitution? Schmitt's answer encompassed two possibilities: the judiciary or the president. A few comments can be made with regard to the former alternative, i. e., constructing a defender on the basis of judicial review. Taking cognizance of Article 102 — "Judges are independent and subject only to the law"[14] — a decision of November 4, 1925, by the German Supreme Court stated that judicial review does not imply

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[12] Carl Schmitt, "Schlussrede vor dem Staatsgerichtshof in Leipzig," *Positionen und Begriffe . . .*, p. 184.

[13] *V*, p. 348 ff.

[14] F. Giese, *Die Reichsverfassung vom 11. August 1919* (6th ed.; Berlin: Carl Heymanns Verlag, 1926), p. 280.

that the judiciary is above the laws[15]. But the judiciary possessed the right not to apply laws if they were in conflict with the constitution, and therefore it had been suggested, according to Schmitt, that the judiciary is the guardian or defender of the constitution[16].

Schmitt quickly pointed out, however, that the German Supreme Court, or any other court, could not be the defender of the constitution, for a judiciary always presupposes the existence of norms, and this, in turn, implies a state of normalcy[17]. During a state of exception many norms are suspended, and therefore a true guardian must be above the norms. Furthermore, Schmitt also pointed out that for a judiciary to be true to its nature decisions must be arrived at *post eventum*[18]. A "... judiciary, for as long as it remains a judiciary, arrives, politically speaking, always too late ...[19]." Consequently what remained was Schmitt's belief that the guardian of the constitution could only be the president of the Reich.

In developing this thesis Schmitt enlisted the aid of Benjamin Constant's concept of the *pouvoir neutre*. Schmitt maintained that it is important to distinguish between a higher third power and a neutral one. The higher third power is sovereign, while the neutral one "is not above, but stands side by side with the other constitutional bodies." Nevertheless, the latter possesses specific prerogatives which enable it to ensure the regular functioning of the constitution as well as its preservation[20].

Under the Weimar constitution, said Schmitt, the president plays the role of a "neutral, mediating, regulating and conserving" force, and he should become active, in Schmitt's view, only in cases of emergency[21]. Although the president had certain prerogatives which made him independent of the lawgiving branch, he was, nevertheless, bound to the countersignature of a minister who had the confidence of the Reichstag[22]. Among his prerogatives were his right to appoint civil

[15] *HV*, p. 15.

[16] *Ibid.*, p. 12. Laws passed under Article 76 were not subject to judicial review. *Ibid.*, pp. 16, 20.

[17] *Ibid.*, p. 19.

[18] *Ibid.*, p. 32.

[19] *Ibid.*, p. 33.

[20] *Ibid.*, p. 132.

[21] *Ibid.*, p. 137.

[22] *Ibid.*, pp. 137—138. This was in practice not so when the Reichstag

and military officers (Article 46), to grant pardons (Article 49), and promulgate laws (Article 70)[23]. These prerogatives, according to Schmitt, were in accordance with the categories that Constant had set up[24], but evidently not sufficient to create a strong and powerful defender of the constitution.

Nevertheless, Schmitt continued to argue in favor of the president being the defender of the constitution. Why? First, because the constitution, especially in view of Article 48, called for a strong president, and, second, he believed that it is only logical that the plebiscitarian basis made the president the natural defender, for he was elected by the people as a whole. "The Reichspresident stands in the center of a

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proved incapable of forming a majority to resolve a no-confidence vote. Incidentally, in the relation between the presidial and parliamentary system, the provision for countersignature (Article 50) was a key point for the protection of the parliamentary system. The procedure of appointing or dismissing a chancellor or ministers depended on the practice of countersignature. But who countersigned? The old or new chancellor? Had the deposed chancellor the right to countersign, he could, by refusing to do so, impede the appointment of his successor. Legally the new presidial system came into being in a relatively unobtrusive fashion. A constitutional law of March 27, 1930 *[Gesetz über die Rechtsverhältnisse des Reichskanzlers und der Reichsminister (Reichsministergesetz)]*, decreed (sections 2 and 13) that the newly appointed chancellor could countersign his own appointment as well as the dismissal of his predecessor. See *Reichsgesetzblatt*, I, No. 9, pp. 96, 97;*Handbuch des Deutschen Staatsrechts* (Edited by G. Anschütz and R. Thoma; Tübingen: J. C. B. Mohr [Paul Siebeck], 1930), Vol. I, pp. 487, 524. It may be of interest to note that this law was passed under the Social-Democratic chancellor Hermann Müller who then fell from office. Brüning's appointment on March 30th inaugurated the presidial system. In this fashion Brüning countersigned the dismissal of Müller (1930), Papen that of Brüning (1932), Schleicher that of Papen (1932), and Hitler that of Schleicher (January 1933).

[23] Articles 24, 45, 48, 70 and 73 dealing with the powers of the president must also be mentioned. Articles 25 and 48 have already been discussed. Article 45 section 1 sentences 1 and 2 state that: "The Reichspresident represents the Reich in matters of international law. In the name of the Reich he concludes alliances and other treaties with foreign powers." F. Giese, *Die Reichsverfassung vom 11. August 1919*, p. 157. Article 70 states that: "The Reichspresident has the responsibility of publishing within one month constitutionally enacted laws in the Reichsgesetzblatt." *Ibid.*, p. 209. Article 73 section 1 states that: "A law enacted by the Reichstag shall be referred to the people within one month before its promulgation if the Reichspresident so orders." *Ibid.*, p. 215; see also: *HV*, p. 158.

[24] *HV*, pp. 137—138.

system built entirely on the plebiscitary basis which is independent of party politics[25]."

"'Independence,'" said Schmitt, "is the fundamental prerequisite of a defender of the constitution[26]," and this independence was cemented by a plebiscitarian foundation. Also the president's right to dissolve parliament in this context must be borne in mind, for such a dissolution, too, constituted an appeal to the mass of voters[27]. Moreover, Schmitt continued, the fact that the president was elected for a seven year term, the difficulties involved in removing him from office, as well as his independence from ever changing parliamentary majorities, made him an appropriate defender[28]. In addition, the constitution also explicitly stated (Article 42) that the president, upon assuming office, must vow to protect the constitution and the laws of the Reich[29].

When Schmitt spoke of the president being the defender of the constitution he assumed its validity and existence. The president's office, according to Schmitt, was the most stable in the Weimar structure, and because of his popular election,, he could serve as a rallying point for the people in time of crisis. And because the president was the center of a plebiscitary system which was, to a large extent, neutral from the viewpoint of party politics, therefore, Schmitt concluded by saying that he served as a counterforce against the plurality of social and economic groupings[30].

This well constituted defender of the constitution had in his hands the mighty instrument of exceptional powers, Article 48. The powers he enjoyed because of this article had increased considerably over a period of ten years. The main reason for this was that section 5 of Article 48 which stated that "Details will be provided in a Reich law"

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[25] *Ibid.*, p. 158.

[26] *Ibid.*, p. 150.

[27] Between 1924 and 1933 there had been seven dissolutions, two of which (1930, 1932) concerned the exceptional power of Article 48. This Weimar practice of dissolving parliament revealed a growing tendency towards a plebiscitarian democracy and ended in the open dualism of two lawgivers: the parliamentary according to Article 68, and the plebiscitarian according to Article 48. See Carl Schmitt, *Verfassungsrechtliche Aufsätze* . . ., pp. 27—28.

[28] *HV*, p. 158.

[29] *Ibid.*, p. 159. This vow was not a pure formality but taken very seriously by Hindenburg.

[30] *Ibid.*.

was never more narrowly defined. In other words, the limits to which the president might go were never specifically circumscribed in a special law. Hence, Schmitt noted, practice by the president resulted in his decrees having the force of law[31], and the acceptance that economic and financial questions were included in a state of exception[32].

In mentioning the decree power of the president which was based on Article 48 section 2, Schmitt noted that the courts had decided not to review these decrees for their validity, and the length of time they could be in force[33]. Schmitt, who in 1924 had argued for the necessity of distinguishing measures from laws, still held to this contention to some extent[34], but stated that actual practice neglected this distinction, and even the Reichstag, according to him, sanctioned the president's decree power[35]. Moreover, the extension of emergency legislation to the economic domain was also sanctioned. And because of the president's practice, Schmitt argued that the provisory situation resulting from section 5 of Article 48 had received a positive content, as a result of the nonexistence of a special law[36]. By accepting now in his legal discussions the dominant view that measures may also have the force of ordinary legislation, Schmitt endowed the president with an important attribute of sovereignty.

Schmitt noted that Article 48 permitted a Reichstag with a normal majority to check the president whenever he transgressed his powers. Moreover, a Reichstag with a normal majority could without doubt become the decisive body in Weimar. But, Schmitt added, this power of the Reichstag depended on whether it was capable of acting: in other words, if it was able to find a working majority. "A Reichstag which is unable to form a majority compels the government to apply extraordinary powers. If the Reichstag did not object to the exercise

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31 Carl Schmitt, "Die staatsrechtliche Bedeutung der Notverordnung, insbesondere ihre Rechtsgültigkeit" (1931), *Verfassungsrechtliche Aufsätze . . .*, p. 238.

32 *Ibid.*, p. 240.

33 *Ibid.*, p. 239.

34 See I, 2.

35 Carl Schmitt, "Die staatsrechtliche Bedeutung der Notverordnung, insbesondere ihre Rechtsgültigkeit," *Verfassungsrechtliche Aufsätze . . .*, pp. 241—242.

36 *Ibid.*, p. 242. A detailed discussion of the legal differences between measures *(Massnahmen)*, decrees that were issued instead of laws *(gesetzvertretende Verordnungen)* and emergency decrees *(Notverordnungen)* is not necessary for our purpose.

of extraordinary powers . . ." Schmitt argued, then it had no way of checking the president's actions[37].

One must not forget, Schmitt pointed out, that all measures undertaken and decrees issued by the president so far were not dictatorial in a revolutionary sense. Quite the contrary. Everything that had been done was geared to overcoming a difficult situation. It was self-evident, Schmitt argued, that Article 48 was employed specifically to protect the constitution[38]. So the arguments used here were similar to those employed previously. But a number of ideas now began to emerge and overlap more clearly than before: the president as a commissarial dictator and therefore a defender of the constitution, and the president in the context of a presidial system.

The first role can be justified within the framework of the constitution. However, in the instance of Schmitt's presidial system[39] the implications were far-reaching. Since considerable segments of the population did not accept the constitution Schmitt, on a number of occasions after 1923, explored its general nature and strongly urged that certain parts be abandoned. In a similar vein he argued that the inability of the Reichstag to act because of its heterogeneous composition clearly revealed the bankruptcy of this liberal institution, and therefore it no longer served a useful purpose. Since the Reichstag was incapable of acting, then the *pouvoir constitué* can be bypassed with the president appealing directly to the *pouvoir constituant.* The people as the mass of voters elected the president for seven years and he appealed to them when he dissolved parliament. These voters are in actuality identical with the people in its function as the *pouvoir constituant.* This is the crucial point at which Bonapartism can set in. The great historical precedent was the *coup d'état* by Napoleon III in 1851 and 1852.

Of significance to understand is Schmitt's various levels of argumentation. Therefore, when speaking of a defender of the constitution

[37] *Ibid.*, p. 258.

[38] *Ibid.*, pp. 259—260.

[39] See René Capitant, "Le rôle politique du Président du Reich," *Revue de doctrine et d'áction politique,* Paris, March 15, 1932, pp. 216 ff. For an interesting coincidence between Schmitt's understanding of the role of the president as defender of the constitution and Article 5 of de Gaulle's constitution see Arnulf Baring, "Ein Hüter der Verfassung? General de Gaulle und die fünfte französische Republik," *Deutsches Verwaltungsblatt,* Heft 3, February 1, 1961, p. 103.

after 1929, the idea of a commissarial dictatorship continued to linger on in Schmitt's writings (which, incidentally, infuriated the extremists, for he justified rule by decree). However, the accent now was clearly on the president in Schmitt's context of the presidial system.

From the viewpoint of political theory Schmitt's presidial system was based on the rule of the president, the officialdom and the army. According to Schmitt, this state had to be qualitative because, by being above the everyday parliamentary struggles, it would serve the entire people rather than just sections of it. This qualitative total state is also authoritarian rather than totalitarian: authority in the domain of politics (i. e., the capacity to distinguish friend from enemy) and freedom of the individual in the realm of the private economic, religious and social spheres[40]. For the presidial system to have had a solid foundation, the president would have had to legitimize his rule by plebiscitary means (Article 41 section 1).

The presidial system was to some extent an expression of Schmitt's desire to return to the nineteenth-century dualist structure: namely, society on the one hand, and the state on the other. But instead of a monarch occupying the throne, Schmitt was willing to see an all powerful president, aided by an officialdom and the army. And at this point it would be consistent to say that if parliament could not be disregarded, then civil society — the opposite pole of the state-machinery — could make its demands felt in parliament. This did not imply, however, that the demands had to be met.

3. Possibilities of Further Constitutional Developments in 1931 and 1932

To give greater substance to the presidial system Schmitt returned to the inconsistencies of the Weimar constitution, namely, the antagonism between the democratic and liberal elements contained in it. In 1932 Schmitt stressed particularly the danger of a purely functional interpretation of the constitution, for a fifty-one percent majority in the Reichstag could enact any ordinary law (Article 68). Similarly, any qualified majority could bring about a constitutional amendment

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[40] For a distinction between the authoritarian and totalitarian state see Heinz Otto Ziegler, *Autoritärer oder totaler Staat* (Tübingen: J. C. B. Mohr [Paul Siebeck], 1932), pp. 37—39.

and revision (Article 76)[41]. He objected to this arithmetical approach, and shared with Maurice Hauriou the view that every constitution contained a basic kernel which could not be abrogated by an ordinary or qualified majority[42]. Among the sacrosanct institutions mentioned by Schmitt were those of marriage, the right of local communities to administer themselves within the confines of the laws (Article 127)[43], the institution of the German officialdom which included the rights and duties of the individual official (Articles 128—130)[44], and the preservation of religious institutions (Article 137)[45].

In arguing for the preservation of these institutions, Schmitt urged that the part of the constitution dealing with institutions be developed according to its inner consistencies, and simultaneously he stressed the need for eliminating the purely functional parliamentary method of voting. If this were not done, he warned, the foes of the constitution could eventually abrogate legally the entire document. Said Schmitt,

> One cannot provide ... for the protection of marriage, religion, private property in the constitution if the same constitution provides for the legal method of abrogating these[46].

Here we have an admission on Schmitt's part that he found decisionism (a concept applicable mainly to a state of exception) insufficient, and hence he began exploring the possibility of constructing a constitution, based not only on the legitimacy of the president, but also on traditional institutions[47] which would have formed a second source of legitimacy — in so far as every order would have had its own legal existence within the confines of a strong state. And, when order and law will have been restored, Schmitt suggested that it may be wise to establish an upper house, a "kind of meeting place" in which the organized interests or concrete orders could meet to discuss problems of mutual interest and arrive at definite decisions[48]. But, he said, to

[41] *LL*, pp. 30—31.

[42] *Ibid.*, p. 61.

[43] Carl Schmitt, "Freiheitsrechte und institutionelle Garantien der Reichsverfassung," (1931) *Verfassungsrechtliche Aufsätze ...*, pp. 143 ff.

[44] *Ibid.*, pp. 149—151.

[45] *Ibid.*, pp. 156—157.

[46] *LL*, p. 48.

[47] The theory of institutional guarantees was first mentioned by Schmitt in 1928. *V*, pp. 170 ff. See also "Grundrechte und Grundpflichten" (1932), *Verfassungsrechtliche Aufsätze ...*, pp. 181 ff.

[48] Carl Schmitt, "Starker Staat und gesunde Wirtschaft," *Volk und Reich*, Heft 2, 1933, p. 91.

bring forth new institutions and a new constitution, the prerequisite must be the creation of a strong state[49].

In the context of the Weimar constitution the transitional stage to a purely presidial system as Schmitt conceived of it could not have been brought about constitutionally. Therefore, by implication, the existing crisis had to be exploited to achieve the desired results. From Schmitt's writings it is not difficult to gather that a sovereign dictatorship would have followed on the heels of a commissarial one, and at some point a new constitution would have been drawn up embodying the principles of Schmitt's presidial system and submitted to the people for approval[50].

In a system of this kind, would an individual, as in a liberal democracy, have individual guaranteed rights with which the state would have hesitated to interfere? Schmitt's answer was contained in an opinion *(Gutachten)* in 1931 on the then acute problem of decreasing the wages of officials. The question was: Is the institution of officials guaranteed, or are the rights of the individual officials guaranteed? According to Schmitt only the former and not the latter was guaranteed[51]. Hence in Schmitt's construction the individual had rights only in so far as he belonged to a concrete order.

To conclude this chapter we note that Schmitt had considerably strayed from the realm of jurisprudence. But simultaneously interesting to note is that even his conception of the presidial system had its roots in the Weimar constitution[52]. His presidial system was his answer to

[49] *Ibid.*, p. 30.

[50] Interesting to note is also Franz Neumann's reaction to Schmitt. After stating that he completely agreed with Schmitt's principle of the "equal chance" (see V, 2), he also said that the second part of the constitution deserved to be freed of its internal contradictions. "I doubt, however, whether there is still enough time to develop clearly the substance of the second part. This substance cannot be the order of a bourgeois Rechtsstaat. I believe that we will agree on this .... But it is more than doubtful to me from my socialist viewpoint whether it is possible to organize the transitional stage between two economic systems constitutionally." This letter is in Professor Schmitt's files, and I possess a photostatic copy of it.

[51] Carl Schmitt, "Wohlerworbene Beamtenrechte und Gehaltskürzungen" (1931), *Verfassungsrechtliche Aufsätze* ..., pp. 174 ff. As early as 1928 Schmitt noted that not only is an official's just fortune safeguarded, but also his title and rank. *V*, p. 172. This does not imply the safeguarding of the official's private interests.

[52] Kurt Sontheimer's contention that Schmitt's presidial system paved the

the problem of establishing order, peace and unity in Germany. As late as 1932 he warned in his *Legalität und Legitimität* that to prevent Germany from being subjected to a worse fate, namely a Nazi or Communist coup, the only long range solution was to heed his suggestions about the constitution. Otherwise: *rächt sich die Wahrheit*[53].

way for Hitler's accession to power has no foundation (see V, 2). "Carl Schmitt: Seine 'Loyalität' gegenüber der Weimarer Verfassung," *Neue politische Literatur*, III. Jahrgang, Heft 10, 1958, pp. 767—768. What was finally responsible for Hitler's appointment was the sterile legal-positivist jurisprudence, a point conceded by Sontheimer. *Antidemokratisches Denken in der Weimarer Republik: Die politischen Ideen des deutschen Nationalismus zwischen 1918 und 1933* (2nd ed.; Munich: Nymphenburger Verlagshandlung, 1964), p. 96.

[53] *LL*, p. 98.

Chapter V

Hitler Conquers Weimar

The tactics employed by revolutionary movements to seize political power is an important and insufficiently emphasized topic. This chapter is concerned mainly with the tactics of illegality and legality as revolutionary instruments in Weimar Germany, the scene of Hitler's success. Although the National Socialists achieved the most spectacular results by employing both methods, it does not appear that they initiated or developed novel tactical or strategic approaches in seizing power. Whatever they knew came primarily from Communist theory and practice, and from Eastern Europe[1]. Despite the savoir-faire of the Communists, the Nazis were victorious. A significant reason for this outcome was perhaps the defeat of the international Communist movement in favor of a national one, i. e., the National Socialist.

1. Legality as a Revolutionary Instrument

Illegality as a revolutionary method was the usual weapon employed by revolutionary groups in the eighteenth and nineteenth century to seize power by force. To many it still seems to be the appropriate revolutionary technique.

Legality as a revolutionary instrument means: (1) the utilization of electoral methods by a revolutionary group as a means of achieving representation in the existing legal institutions, (2) the utilization of all existing political and social institutions by such a group as propaganda platforms, and (3) the use (when the group obtains partial or total political power legally) of the state apparatus for the purpose of

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[1] Konrad Heiden in *Der Führer: Hitler's Rise to Power* (Boston: Houghton Mifflin Company, 1944) discusses at length the influence "The Protocols of the Wise Men of Zion" had upon early Nazi strategy regarding the acquisition of political power.

altering or abolishing all those institutions which made its rise to power possible.

A simultaneous combination of both methods — illegality and legality has lately become the rule. In 1895 Engels noted that

> The irony of world history is ... that we the 'revolutionaries,' the 'subversionists,' thrive much better on legal rather than illegal means to accomplish the overthrow. The parties of order *(Ordnungsparteien)* ... are ruined by their self-created legal order. In despair they cry ... 'la légalité nous tue, legality is our death.' On legality we thrive, on legality we acquire tight muscles and red cheeks, and we look like perpetual life[2].

Whereas the emphasis here is on legality as a revolutionary instrument, Lenin, the greatest revolutionary of all times, stated that those "revolutionaries who are incapable of combining *all* the legal with the illegal means [to accomplish their ends] are extraordinarily bad revolutionaries[3]". Lukács, in discussing the question of legality and illegality as instruments for seizing power, concluded that the Communists consider both as tactical weapons only[4].

With regard to Weimar Germany the Nazi party passed through two periods: (1) the period when only force was applied, and (2) the legal period. The former lasted up to the time of the Beer Hall *Putsch* in 1923, and it was characterized as a period in which the main aim of the Nazis was to capture the army and the police. The defeat of the National Socialists as a result of the Beer Hall *Putsch* inaugurated the legal period. But Professor Watkins aptly pointed out that

> It would be a mistake to suppose, however, that the adoption of electoral methods involved the abandonment ... of revolutionary ends. As a matter of fact, private armies were maintained throughout this period on a quite unprecedented scale by the extremist parties of Germany. The most spectacular of these irregular forces were the National Socialist Storm Troops .... Devoted in large measure to the dissemination of election propaganda ... these private armies were also quite ready to use violence for the accomplishment of their purposes. The total result of their activities was to make

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[2] F. Engels, Introduction to Karl Marx's, *Die Klassenkämpfe in Frankreich 1848—1850* (Berlin: Verlag Buchhandlung Vorwärts Paul Singer G.m.b.H., 1911), p. 21.

[3] V. I. Lenin, *Der "Radikalismus," die Kinderkrankheit des Kommunismus* (Leipzig: Franckes Verlag G.m.b.H., 1920), p. 74. Italics Lenin's.

[4] Georg Lukács, *Geschichte und Klassenbewusstsein* (Berlin: Der Malik Verlag, 1923), p. 269.

illegal force a problem hardly less serious in the later than in the earlier days of the Republic[5].

Although numerous references were made by Hitler in *Mein Kampf* to a National-Socialist state and its structure, he made no explicit statement about the methods he intended to employ to take power. Yet he did openly state that his Storm Troops (SA) were not to take the form of a secret organization, i. e., similar to Communist cells.

> *What we needed and do need, were and are not a hundred or two hundred bold conspirators, but hundreds and hundreds of thousands of fanatical fighters for our world-concept. Not in little secret gatherings is the work to be done, but in mighty mass processions, and not by means of dagger and poison or pistol can the path be broken for the movement, but through the capture of the highway. We have to show Marxism that the future lord of the highway is National Socialism . . .*[6].

The first explicit assertion of Hitler's intention to abide by the principle of legality was made before the German Supreme Court *(Reichsgericht)* in September 1930, during the celebrated trial of three *Reichswehr* officers for treasonable activities on behalf of the Nazi party. In this trial Hitler appeared before the Court to testify. When asked about the aims of his party he openly declared that

> The Constitution gives us the ground on which to wage our battle, but not its aim. We shall become members of all constitutional bodies, and in this manner make the Party the decisive factor. Of course, when we possess all constitutional rights we shall then mould the State into the form that we consider to be the right one[7].

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[5] Frederick M. Watkins, *The Failure of Constitutional Emergency Powers under the German Republic* (Cambridge: Harvard University Press, 1939), pp. 54—55.

[6] A. Hitler, *Mein Kampf* (Unexpurgated edition; New York: Stackpole Sons, 1939), p. 525. Italics are Hitler's.

[7] As quoted by Konrad Heiden, *A History of National Socialism* (New York: Alfred A. Knopf, 1935), p. 134. In 1934 Goebbels stated that "We National Socialists ... have never asserted that we represent a democratic point of view, but we have openly declared that we only utilized democratic means to win power. After the conquest we ruthlessly deny to our opponents all those means that were permitted to us while we were in the opposition." Reprinted by Walther Hofer in *Der Nationalsozialismus: Dokumente 1933—1945* (Frankfurt a/M: Fischer Bücherei, 1957), p. 27. See also Ernst Nolte's *Three Faces of Fascism* (Translated from the German by Leila Vennewitz; New York: Holt, Rinehart and Winston, 1966), pp. 337 ff.

The reason for Hitler's stress on legality was no doubt his realization of how solidly entrenched officialdom was in Germany. An insight provided previously by Max Weber is significant in this context. He observed that the true rulers of the modern state are the army and civil service[8] who administer *sine ira et studio*[9].

In analyzing the nature of the three types of legitimate rule — legal, traditional and charismatic — Weber mentioned legal rule first, and this form of rule does not, according to him, emanate from a person but from a set of rules which come into force through the legally constituted authority[10]. The relationship between the officialdom and the legally constituted authority is significant, for in a country where the officialdom has not been dislodged, it adheres only to those rules that have come about through the legally constituted authority. To the officialdom it makes little difference whether one day legal rules emanate from the National Socialists and on the following from the Communists. According to Schmitt, "the authorities obey only the legal superior. Legality is ... the mode of operation *(Funktionsmodus)* of the modern bureaucracy ...[11]." This also includes the army.

Having failed to overpower the army and the police in their quest for power during the early years of Weimar's existence, the Nazis changed their tactics by utilizing also respectable bourgeois electoral methods. The Hitlerites realized that they could not conquer a well entrenched and respected army and police force by employing crude methods of violence alone. Moreover, the police force constituted only one part of officialdom. To be successful in Germany, they had not only to take power, but simultaneously obtain support of the army and the entire officialdom. This could be accomplished if Hitler acquired power legally. Hence Hitler's declaration of September 25, 1930. Furthermore, before constitutional revisions could be enacted, it was essential to have a two-thirds majority in the Reichstag. To capture the post of chancellor and that of the president was also all important, for the latter, according to the Weimar constitution, had not only the right to dismiss a chancellor (Article 53), but was also

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[8] Max Weber, *Staatssoziologie* (Edited by Johannes Winckelmann; Berlin: Duncker & Humblot, 1956), p. 32.

[9] *Ibid.*, p. 45.

[10] *Ibid.*, pp. 99—100.

[11] Carl Schmitt, "Starker Staat und gesunde Wirtschaft" (1932), *Volk und Reich*, Heft 2, 1933, p. 93.

commander in chief of all the armed forces (Article 47), and it was his duty to appoint and dismiss civil and military officers (Article 46).

2. The "Equal Chance" and the Political Premiums of the Legal Possession of Legal Power

As early as 1921 Schmitt was aware of legality and illegality as revolutionary instruments employed by the Communists[12]. Moreover, there is no reason to believe that he was not acquainted in the mid-twenties with the ways in which the National Socialists would attempt to gain power. But at the same time he pointed out that one of the underlying assumptions of every liberal parliamentary system is that the party in power should not deny any other party the right to acquire power[13]. Schmitt called this the principle of the "equal chance." For this principle to function smoothly one must, according to Schmitt, assume that all political parties accept the political system as a whole; and inextricably linked with this precondition is its corollary, that political parties abide by the generally accepted rules of the game of politics[14].

An ever present danger in liberal democracies are parties which deny the constitutional foundation and, notwithstanding, are included in coalitions. Not only is an ordinary or qualified majority of the members of such parties in parliament in a position to endanger or destroy the constitution, but also when a disruptive party is only a member of a coalition, possibilities arise of changing the meaning of the constitution. In so far as Weimar Germany was concerned, an ordinary majority in parliament could, for example, by changing parts of the election law prevent other political parties from ousting them and vice versa (i. e., the five per cent clause). Similarly, by way of Article 76 any qualified majority was able to abrogate the entire constitution. The document made no explicit provision for its own preservation. Coupled with this lack of a safety-valve was the para-

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12 See *D*, p. vi; also: Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924—1954: Materialien zu einer Verfassungslehre* (Berlin: Duncker & Humblot, 1958), pp. 345—350, 397—420, 436—439 and 440—451.

13 *LL*, p. 32.

14 *Ibid.*, p. 37; also: Carl Schmitt, "Staatsethik und pluralistischer Staat" (1930), *Positionen und Begriffe im Kampf mit Weimar — Genf — Versailles 1923—1939* (Hamburg: Hanseatische Verlagsanstalt, 1940), pp. 144—145.

lyzing effect of legal-positivist jurisprudence. Even the president's hands were tied by a strict interpretation of Article 48.

Against this background Schmitt maintained that the "equal chance" can be left open only to those who will not violate it[15]. Otherwise, Schmitt argued, a party which disregards this principle could, after winning a majority in the Reichstag, enact any laws it deemed fit (Articles 68 and 76)[16].

> The claim on legality by the majority party in power can make every opposition ... 'illegal.' If the majority has control ... over legality and illegality, then it can ... declare its domestic political competitor to be illegal[17].

In the same vein Schmitt observed that

> Whoever has the majority makes the valid laws; moreover, it validates those laws that it has made. Validity, and making valid, the producing and sanctioning of legality is its monopoly[18].

An extremist party which acquires power legally can thus, according to Schmitt, close the door behind itself legally and exclude political opponents from acquiring power by the same legal route. The situation is also serious when an extremist party gains dominance in a coalition by way of the "equal chance." The party thus acquires a dominant voice in a coalition and wrests control of the three elementary political premiums of legal power. These are, according to Schmitt: (1) presumption of legality, (2) the provisional carrying out of a statute and obedience *(obéissance préalable)*, and (3) the interpretation of general clauses, especially public order and security. Thus, whoever acquires legal power by way of the "equal chance" defines, interprets and sanctions legal power. By utilizing the "equal chance" to acquire the political premiums of legal power, an extremist party can assume the role of sovereign dictator, because it is in possession, as Schmitt put it — besides the purely normativist possession of legal power — of a political "surplus value[19]." The manipulation of Article 48 could in such a situation become decisive.

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[15] *LL*, p. 37.

[16] *Ibid.*, pp. 30, 48.

[17] *Ibid.*, p. 33.

[18] *Ibid.*, p. 35. This concept of majority rule is applicable in countries where all parties accept the same premises. This was not so in Weimar.

[19] *Ibid.*, pp. 30 ff.

The crucial year 1932 saw the almost complete collapse of the Reichstag. Political parties of the extreme right, the National Socialists, and the left, the Communists, successfully impeded normal parliamentary procedures. As a result the government ruled by decree. But its actions were not sufficiently decisive to stamp out the dissident forces. In combatting the crisis Hindenburg had two alternatives: to rely on the dominant view, or to strengthen the presidial system. The dominant interpretation of the Weimar constitution was for the indiscriminate granting of the "equal chance[20]." This implied, of course, that any negative party may acquire the political premiums of legal power. The logical conclusion to be drawn from this approach is that every political party must be given an equal chance to destroy the constitution.

As has already been pointed out, Schmitt's "equal-chance" concept presupposed a normal parliamentary situation, a situation in which all political parties agreed upon the rules of the game. Since this was not the case for a great part of Weimar's existence, and certainly not in 1932, the alternative left to the president was, according to Schmitt's reasoning, to rule with an iron hand. Schmitt's "equal-chance" concept, in its relation to the political premiums of legal power, must be viewed in this context as his last attempt in 1932 to break the normativist system by injecting politics into jurisprudence[21], for the concrete

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[20] In an exchange of letters in 1930 on this point G. Anschütz answered Schmitt as follows: "Most important is your renewed appeal to me about Article 76. Do not think that I am uninstructible and obstinate — but I cannot agree with you, and must reassert that by way of Article 76 not only 'minor,' but also 'major' ... constitutional revisions may and can be decided upon. Whether one ... utilizes the 'may' and 'can' is not a question of constitutional law, but of politics." This letter is in Professor Schmitt's files, and the author possesses a photostatic copy of it.

[21] Reflecting upon this period, Schmitt wrote in 1958 that his essay *LL* "was a desperate effort to save the presidial system ... from a jurisprudence which refused" to distinguish friend from enemy. Carl Schmitt, *Verfassungsrechtliche Aufsätze* ..., p. 345. It is interesting to note in this context Franz Neumann's reaction to Schmitt's theory of the "equal chance." In a letter to Schmitt dated September 7, 1932, Neumann stated that: "I too believe that parliamentary democracy can function only as long as it is possible to follow the principle of the equal chance. It is obvious that if this principle of gaining domestic power fails, then the parliamentary lawgiving state must necessarily fail to function as well .... Should one entertain the point of view that the basic political contrast in Germany is the economic, that the decisive friend-enemy grouping is labor and capital, then it becomes obvious that in such a political contrast it is no longer possible to rule by parliamentary means. To

question in that crucial year was: Should a negative political party or a majority of two negative political parties acquire the chancellorship? The chancellorship signifies to an extent the possession of the political premiums of legal power. According to Schmitt's "equal-chance" concept, the president should under no circumstances permit the leader of a negative political party to acquire this significant office.

Thus in the concrete parliamentary situation in 1932 Schmitt argued for the strengthening of the existing presidial system and by so doing forestall a victory of the extreme right or left — indeed a sound alternative for a conservative thinker. The connection between the "equal chance" and the emphasis on the political premiums was the key to the prevailing situation as well as to the political theory of Carl Schmitt.

3. Hitler's Appointment and the Sixty Days

A question still debated is: What were the reasons for Hindenburg's sudden reversal vis-à-vis Hitler, especially in view of the fact that it was common knowledge that Hitler intended to utilize his powers — legally achieved — to abolish legally the Weimar republic?

We learn from Bracher of Hindenburg's distaste for the continuous application of Article 48[22] — the instrument of the presidial system. From this also may be deduced Hindenburg's distaste for repeatedly dissolving parliament (Article 25)[23]. His overwhelming desire was, according to Bracher, to appoint a chancellor of a genuine parliamentary majority government which would have freed him of decree practice and the burden of the presidial system[24]. Chancellor Schleicher did not even possess parliamentary backing. He had received at first

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adhere to the principle of the equal chance, both giant groups would have to agree upon a compromise. You have attempted to point this out for the last ten years, but, as has become clear, your effort was a total failure. If they do not agree upon a compromise, then the principle of the equal chance can under no circumstances mean that one day it is possible to govern socialistically and another day capitalistically." This letter is in Professor Schmitt's files, and the author possesses a photostatic copy of it.

[22] Karl Dietrich Bracher, *Nationalsozialistische Machtergreifung und Reichskonkordat* (Wiesbaden: Hessische Landesregierung, 1956), p. 31.

[23] Carl Schmitt, *Verfassungsrechtliche Aufsätze . . .*, p. 28.

[24] Bracher, *Nationalsozialistische Machtergreifung . . .*, p. 31.

Hindenburg's consent for still another dissolution of the Reichstag which was to be followed by new elections. In his demand for a new dissolution Schleicher naturally assumed that he would remain chancellor during the crucial sixty days (Article 25) until the new election. Thus he himself (a neutral, non-party government) would have been in possession of the political premiums of legal power, and probably would have prevented the large scale abuse of power. Hitler, on the other hand, utilized his power brutally during the whole month of February 1933. But Hindenburg suddenly changed his mind about Schleicher. Why?

The distaste of applying Article 48, the constant dissolutions of the Reichstag and the general discontent with the presidial system — shared by Hindenburg — worked against the person of Schleicher and facilitated his being attacked by many political enemies — including v. Papen and Hitler. Hitler's propaganda utilized the anti-militarist feelings of democratic parties and charged General Schleicher with practicing a dictatorship of militarism and fomenting "terror by bayonets[25]." The parliamentary situation at the end of January which led to Hitler's appointment was decisively influenced by the open letter Prelate Kaas, head of the Center party, mailed to Schleicher on January 26, 1933[26]. In it Kaas emphasized first, the necessity of dissolving parliament; second, he demanded that new elections be held within sixty days according to the unambiguous provision in Article 25 section 2 — because Hugenberg and the Conservatives planned a dissolution without new elections on the ground that there was a state of emergency; and, third, he insisted on the constitutional obligation of the president to appoint immediately a chancellor whose appointment would conform to the principles of parliamentary

[25] Rudolf Morsey, ed., "Unterredung des Reichskanzlers Hitler und des Reichsinnenministers Frick mit den Zentrumsführern Kaas und Perlitius" (January 31, 1933), *Vierteljahrshefte für Zeitgeschichte*. Heft 2, 9. Jahrgang, 1961, Document I, p. 186. By fomenting the anti-militarist tendencies against the person of Schleicher, Hitler succeeded in confusing the honest liberal democrats. At this moment the slogan "terror by bayonets" in Hitler's mouth against Schleicher was a masterful demagogic stroke.

[26] The letter was reprinted in the *Jahrbuch des öffentlichen Rechts der Gegenwart* (Tübingen: Verlag von J. C. B. Mohr [Paul Siebeck], 1934), Band 21, 1933/34, pp. 141–142. This letter appeared in the press on January 29, 1933. A copy of it was also mailed to Hindenburg. Rudolf Morsey, "Die Deutsche Zentrumspartei," *Das Ende der Parteien* (Edited by Erich Matthias and Rudolf Morsey; Düsseldorf: Droste Verlag, 1960), pp. 337–338.

government, in other words, a government which had sufficient parliamentary backing[27]. Such an appeal to the principles of parliamentary government could at this moment only be interpreted as a demand for including Hitler in any new government, for his party had the largest number of representatives in the Reichstag, although it had no parliamentary majority. This third demand implied the immediate dismissal of Schleicher, who had no parliamentary backing, and the appointment of Hitler, who promised to find it.

The fate of new elections was sealed with Kaas' demand for constitutional legality. Hitler declared in Papen's apartment on January 29, 1933, that he was ready to form a coalition government provided the Reichstag were dissolved and new elections held in accordance with Article 25 section 2[28]. Not only did this imply that Hitler would be in possession of the political premiums of legal power during the sixty days, but that he had maneuvered himself into the role of the defender of legality. This must certainly have appealed to Hindenburg's sense of loyalty to the Weimar constitution.

Hindenburg's safety valve against Hitler had been Hugenberg, leader of the Conservative party. Hugenberg preferred, however, an immediate dissolution of the Reichstag without new elections taking place[29]. This would have constituted a clear violation of Article 25 section 2. But Hitler's staunch defense of the correct application of Article 25 section 2 combined with Hugenberg's *volte face* from his earlier position on new elections led Hindenburg to appoint Hitler Chancellor of Germany on January 30, 1933. Hugenberg's *volte face* occurred just a few seconds before Hitler entered Hindenburg's study[30]. In this curious situation Hitler's defense of legality reached the height of paradoxical absurdity.

It must be pointed out that Hitler, at this time, did not possess a parliamentary majority, nor did he receive an ordinary majority for

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[27] *Jahrbuch des öffentlichen Rechts* . . ., pp. 141—142. For a detailed discussion on the role of the Center party's desire to include Hitler in a coalition government towards the end of 1932 see Morsey's "Die Deutsche Zentrumspartei," pp. 315 ff., 428.

[28] Ewald von Kleist-Schmenzin, "Die letzte Möglichkeit," *Politische Studien*, Heft 106, 1959, p. 91.

[29] *Ibid.*, pp. 91, 92.

[30] Friedrich Frhr. Hiller von Gaertringen, "Die Deutschnationale Volkspartei," *Das Ende der Parteien*, p. 574.

his party in the election of March 1933. But apparently in late January 1933 the semi-senile and ill advised Hindenburg was content to have acted correctly according to the predominant interpretation of the Weimar constitution. By appointing Hitler, rather than keeping Schleicher, Hindenburg wanted to avoid government decree under Article 48, and the burden of the presidial system. But despite Hitler's appointment, Hindenburg was not freed from either government by decree or from a presidial system. By his appointment of Hitler he achieved only the passage of the enabling act of March 24, 1933.

Part Two

Schmitt and National Socialism: 1933-1936

Chapter VI

State, Movement, People

Schmitt's intentions between March 1933 and December 1936 were twofold: (1) to sketch a constitutional plan for the National-Socialist one-party system, and (2) to develop the concept of concrete-order thinking for German jurisprudence. In the process of outlining these two aspects Schmitt paid some lip service to the terminology of National-Socialist propaganda. The vocabulary he used (i. e., "blood and soil") in his major brochures in 1933[1] and 1934[2] is usually not in harmony with the general tone of these works. Nevertheless, enchantment with the leadership aspect is sincere. Nazi ideology may be detected in Schmitt's other writings, especially after 1935. A cursory glance at these works, written after 1935, may engender the impression that he had succumbed to Nazi ideology which indeed, he had done on a number of points; but, as will be shown in Chapter IX, in at least one respect — the concept of race — Schmitt did not follow the Nazi line.

1. Schmitt's Volte Face: The Enabling Act of March 24, 1933

To understand the factors which led Schmitt on May 1, 1933, to join the National-Socialist party, and the role he attempted to play in Germany, a few events must be singled out: (1) the Reichstag fire of

[1] Carl Schmitt, *Staat, Bewegung, Volk: die Dreigliederung der politischen Einheit* (3rd ed.; Hamburg: Hanseatische Verlagsanstalt, 1935). Hereafter: *SBV*.

[2] Carl Schmitt, *Über die drei Arten des Rechtswissenschaftlichen Denkens* (Hamburg: Hanseatische Verlagsanstalt, 1934). Hereafter: *DA*.

February 27, 1933, (2) the election of March 5, 1933, and (3) the enabling act of March 24, 1933.

As a result of the Reichstag fire a presidential decree was promulgated on February 28 which suspended all constitutional guarantees of individual liberty[3]. From this decree Hitler derived powers which enabled him within a few months to eliminate his opponents, to outwit his coalition partners, and to make sure that only his party would be legally recognized[4]. Because Hitler had been in possession of the political premiums of legal power since his appointment in January 1933, the Reichstag fire provided him with a welcome pretext to unleash a reign of terror. Immediately following the fire the Communists were branded as the incendiaries. This was followed by the arrest of 4000 Communist functionaries, and an order prohibiting the publication of Communist literature[5]. Had Schleicher remained chancellor during the sixty days, between the dissolution of parliament and new elections (Article 25), and hence in the legal possession of power, this fantastic utilization of the Reichstag fire perhaps would not have taken place and would even have been unimaginable. Only by this comparison, whether Schleicher or Hitler should occupy the post of chancellor, can we understand the practical meaning of Schmitt's theory of the political premiums of legal power as developed in his *Legalität und Legitimität* (1932). Speaking concretely: to be in control of the police, the mass media, etc. at such a moment is decisive.

Next came the March 5 election. Prior to this election Hitler's coalition cabinet, which consisted of National Socialists and German Nationals, vowed that the forthcoming election would put an end to

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[3] Section 1 of the "Decree of the President of the Reich for the Protection of the People and the State" of February 28, 1933, provides for the suspension of the following articles of the Weimar constitution: 114, 115, 117, 118, 123, 124 and 153. "Restrictions of personal freedom, the right of free expression of opinion, including the right of the press, the right of associations and meetings, interference with the secrets of letters, of the post, the telegraph and the telephone, the issue of search warrants, as well as orders for the confiscation or restriction of property — ... are ... also admissible beyond the otherwise legally fixed limitations." *Reichsgesetzblatt*, I, No. 17, 1933, p. 83.

[4] Hermann Mau and Helmut Krausnick, *Deutsche Geschichte der jüngsten Vergangenheit, 1933—1945* (2nd ed.; Stuttgart: J. B. Metzlersche Verlagsbuchhandlung, 1956), p. 26.

[5] *Ibid.*, p. 25.

all elections; and that the sole task of the newly elected Reichstag would be to pass an enabling act. Although one cannot consider the election to have been entirely free of coercion, the German people did elect 288 National-Socialist representatives to the Reichstag — only 92 more than in the previous election. This still did not give them a majority. The German Nationals neither gained nor lost. With their 52 representatives the coalition mastered 340 representatives in all. Thus the two factions possessed only an ordinary majority in a Reichstag of 647 members. To pass an enabling act it had to muster a two-thirds qualified majority (Article 76)[6].

Between March 5 and March 23 Hitler went about enlisting the support of the different parties (excluding the Communist party) for his proposed enabling act. In the face of threats against the Social Democrats and "false" promises to the Center party[7], the act was passed on March 23 and enacted the following day. Of the 538 representatives present in the Reichstag, 444 voted for the act ("An Act to Relieve the Distress of the People and the Reich"); the 94 negative votes being those of the Social Democrats[8]. Thus a two-thirds majority was obtained for the amendment of the constitution by legal means[9].

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[6] *Ibid.*, pp. 27—29.

[7] Rudolf Morsey, "Die Deutsche Zentrumspartei," *Das Ende der Parteien* (Edited by Erich Matthias and Rudolf Morsey; Düsseldorf: Droste Verlag, 1960), pp. 363—365. See also: Guenter Lewy, *The Catholic Church and Nazi Germany* (New York: McGraw-Hill Book Company, 1964), pp. 34—36.

[8] Hans Schneider, "Das Ermächtigungsgesetz vom 24. März 1933: Bericht über das Zustandekommen und die Anwendung des Gesetzes," *Schriftenreihe der Bundeszentrale für Heimatdienst,* 2nd enlarged edition, Heft 10, 1961, pp. 26—27. A wealth of material has finally appeared on the role Kaas played in bringing about the enabling act. Morsey, "Die Deutsche Zentrumspartei," pp. 353 ff, 434—435. The role the German Catholics played in consolidating Hitler's rule after the enabling act has been brilliantly described by Ernst-Wolfgang Böckenförde, "Der deutsche Katholizismus im Jahr 1933," *Hochland,* Heft 3, 1961, pp. 215 ff. See also: Guenter Lewy, *The Catholic Church . . .*, p. 91.

[9] Böckenförde observed that the Center party in conjunction with the BVP *(Bayerische Volkspartei)* and the Social Democrats could have blocked Hitler's plan of flouting the constitution. "Der deutsche Katholizismus im Jahr 1933," pp. 217—218. Incidentally, Kaas' unceasing efforts to support Hitler had been stoutly opposed by other prominent Catholics in the Center party. Among them were Heinrich Brüning and Adenauer. When their influence waned, according to Böckenförde, they withdrew into *die stille Opposition. Ibid.*, p. 225.

The act stated that:

Article 1. Reich laws can be passed, not only by the procedure provided in the constitution, but also by the Reich government....

Article 2. The laws decreed by the Reich government can deviate from the Reich constitution in so far as they do not apply to the institutions of the Reichstag and Reichsrat. The rights of the President remain intact.

Article 3. The laws decreed by the Reich government are drawn up by the Chancellor and reported in the Reichstag's law journal....

Article 4. Treaties of the Reich with foreign states, which relate to subjects of Reich legislation, do not require the consent of the bodies participating in the legislation....

Article 5. This law ... expires on April 1, 1937; furthermore, it expires if the present Reich government is replaced by another[10].

In view of the happenings since January 30, 1933, Schmitt declared in 1933 that "the Weimar constitution [as a whole] is no longer valid." This did not imply, he maintained, that every single provision of the constitution had to be abrogated. Such provisions continued to be valid until replaced. But the constitution as a whole, he observed, had lost its spiritual foundation. He substantiated his argument by citing Hindenburg's decision to abandon the national colors on March 12, 1933 (Article 3)[11]; the passage of the enabling act which in an unprecedented fashion empowered the Reich government to pass and enact constitutional as well as ordinary laws[12]; the enactment of the law of April 7, 1933 (which Schmitt had helped to formulate — his first act of collaboration) eliminating the age-old German federal problem by subordinating the state governments to the Reich, thus invalidating Articles 5, 15, 17 and 19[13]; and, the decision of July 14, 1933, to outlaw all other parties but the National Socialist[14]. As a matter of fact, in view of the far-reaching powers the government now derived from the enabling act, this act, according to Schmitt, can be considered as having the validity of a new temporary constitution[15].

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10 *Reichsgesetzblatt*, I, No. 25, 1933, p. 141.

11 *SBV*, p. 5.

12 "Das Gesetz zur Behebung der Not von Volk und Reich," *Deutsche Juristen-Zeitung*, Heft 7, 1933, pp. 445—447.

13 Carl Schmitt, "Das Reichstatthaltergesetz," *Das Recht der nationalen Revolution* (Berlin: Carl Heymanns Verlag, 1933), Heft 3, p. 23.

14 *SBV*, p. 5.

15 *Ibid.*, p. 7.

Despite Schmitt's assertion on the death of the Weimar constitution, this document was never officially abrogated[16]. Hitler's capture of Germany was in fact an example of sovereign dictatorship, especially after March 24, 1933. Why didn't Schmitt mention the concept of sovereign dictatorship, a concept which he so clearly developed in 1921? Perhaps this may be answered by pointing out that Hitler came to power legally in January, and promised to proceed constitutionally to alleviate the problems at hand. Even the enabling act did not give him absolute power. Hitler continued to strengthen the facade of legality by objecting to the official abrogation of the constitution. It is in this context that we can explain the repeated renewal of the enabling act in 1937, 1939, and finally on May 10, 1943[17].

What were the circumstances responsible for Schmitt's *volte face* with regard to Nazism? Schmitt's opinions on the Weimar constitution were reviewed in Part I, and the conclusion drawn was that although Schmitt cannot be considered a savior of it, nevertheless, he did not flirt with the National Socialists, even when he went beyond the limits of the constitution. His writings, especially in 1932 and even in January 1933, aimed at stopping the National Socialists and Communists from making further inroads into the German political arena. On the question of joining the National-Socialist party, the turning point for Schmitt came as a result of the passage of the enabling act. Schmitt felt that in granting the government an enabling act of an unprecedented nature, the Reichstag had recognized Hitler as a leader who could cure Germany's ills. Furthermore, he also reasoned that, since the new government had the support of a considerable segment of the people as well as of the Reichstag, by joining the party he would be able to steer the National-Socialist system in a direction which, he hoped, would be superior to the bankrupt Weimar system. Hence he

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[16] Schmitt's thesis on the invalidity of the Weimar constitution was supported by Ernst Rudolf Huber. Authentic National Socialists as H. Nicolai and G. H. Walz, among others, maintained that the National Socialists utilized the Weimar foundation to produce law and order. They considered the National-Socialist revolution to be primarily cultural in nature rather than legal. Changes of legal forms were not considered revolutionary, but merely legal reforms. See Ernst Rudolf Huber, *Verfassungsrecht des Grossdeutschen Reiches* (2nd ed.; Hamburg: Hanseatische Verlagsanstalt, 1939), pp. 47 ff.

[17] Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924—1954: Materialien zu einer Verfassungslehre* (Berlin: Duncker & Humblot, 1958), pp. 443, 450.

applied for membership in the party on May 1, 1933[18]. Certainly, his anti-liberal views facilitated his decision to participate in the Nazi venture. Moreover, his failure to impress his views on those concerned with the Weimar constitution during the Weimar period must have deeply disappointed him, and this was also to an extent responsible for his having been driven into the arms of the Nazis. Likewise, as was noted above, he was enchanted with the leadership concept. This is not surprising in view of his religious and, to an extent, his intellectual heritage. By opting for National Socialism Schmitt merely transferred his allegiance to the new legally constituted authority, and this was not incompatible with his belief in the relationship between protection and obedience.

At the time Schmitt joined the party he did not yet realize the dynamism of this movement. In common Nazi parlance, the terms "party" and "movement" were used synonymously. Nevertheless, in retrospect it may be observed that they comprised two aspects, the organizational and the ideological. Membership in the party was purely organizational and did not necessarily connote an extraordinary status symbol. The party was a mass party of many millions, and not at all an elite. On the other hand, the ideological aspect was all embracing in that the Nazi movement claimed to represent the whole people rather than just a part. Prior to July 14, 1933 (the date on which all other parties were outlawed), the National-Socialist party formed only one part of a whole. After that date, however, the part became more important than the whole, because the National Socialists were able to drive all other parties out of existence. When this was accomplished, the movement moved swiftly to permeate and effectively color with the shade of brown all public and private institutions[19].

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[18] The author gathered some of this information as a result of his extensive conversations with Professor Schmitt. See also Introduction (1).

[19] After Hindenburg's death, for example, army officers had to swear allegiance to Hitler personally. See Telford Taylor, *Sword and Swastika* (New York: Simon and Schuster, 1952), pp. 80—82. The civil service law of 1937 did away with the concept of political neutrality. The bureaucracy thus became a tool of Hitler's machinations. See Paul Seabury, The *Wilhelmstrasse* (Berkeley: University of California Press, 1954), pp. 79 ff. On the nature of the party's organization see Joseph Nyomarkay, *Charisma and Factionalism in the Nazi Party* (Minneapolis: University of Minnesota Press, 1967), pp. 26 ff.

In this historical setting Schmitt, in 1933 and 1934, had the vanity to play the role of the crown-jurist of National Socialism. But in this self-appointed role his jurisprudence was colored by some fascist and conservative[20] ideas he had entertained during the Weimar period. These ideas had similarities with Nazi notions, and yet had little in common with what the Nazis practiced. By the end of 1936 Schmitt had ceased to play a significant role in Germany, and Professor Arendt correctly observed that he was replaced by the Nazi-brand of political and legal theorists, such as Hans Frank, Gottfried Neesse, and Reinhard Höhn[21].

As early as 1934 Schmitt began to sense that he might again be heading for failure. To avoid this he often bent backward and justified Nazi excesses in the realm of jurisprudence, but he always continued to argue that the *Führer* must assume responsibility for all his deeds. Similarly, to avoid renewed failure, Schmitt joined the National-Socialist bandwagon of anti-Semitism. This newly acquired outlook can be comprehended only as a last effort on his part to succeed in life, because during the Weimar period he had many Jewish friends and even dedicated one of his most important works, *Die Verfassungslehre*, to his Jewish friend Fritz Eisler.

2. Constitutional Sketch for the New System

With the emergence of the party as the dominant force in Germany, a new relationship between it and the state came to the fore. The party was a new kind of party, a totalitarian party, and therefore the question was what was its place in the state. Over the last one hundred and fifty years four distinct theories on the types of state had been advanced: (1) the state as an entity above society (Hegel), (2) the

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[20] For similarities and differences between conservatism and fascism or National Socialism see Klemens von Klemperer's *Germany's New Conservatism:* Its History and Dilemma in the Twentieth Century (Foreword by Sigmund Neumann; Princeton: Princeton University Press, 1957), pp. 26 ff. Unfortunately, von Klemperer does not distinguish clearly between fascism and National Socialism. This gap has been filled by George L. Mosse in *The Crisis of German Ideology: Intellectual Origins of the Third Reich* (New York: Grosset & Dunlap, 1964), pp. 312 ff.

[21] Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace and Company, 1951), p. 332.

state as a bourgeois instrument which suppresses and exploits the proletariat (Marx), (3) the state as only one association among many (Laski), and (4) the National-Socialist party as a total party analogous to the Communist one-party system.

Perfunctory and demagogic comments on the nature of the state are found in *Mein Kampf*. Among other declarations Hitler said

> *that the state is not an end, but a means. It is indeed indispensable to the formation of a higher human civilization, but it is not the cause. The latter consists exclusively in the existence of a race capable of culture*[22].

Thus, according to Hitler, within the confines of the state a higher existence was possible. For Hitler this meant that the National-Socialist party or movement would guide the inhabitants of the state to achieve a higher aim[23], and this was, according to Nazi theory, a "philosophy of race."

After observing carefully the role the party played immediately following Hitler's accession to power, Schmitt outlined his observations. On the basis of these he suggested, in the autumn of 1933, that the new German constitution rested on a triple foundation of state, movement, people.

> Every one of the three words, state, movement, people, may be utilized for the whole of the political unit. But, simultaneously, it also characterizes a definite side and a specific element of this whole. As such, the state permits itself to be designated in a narrower sense as the politically static part, the movement as the politically dynamic element, and the people constitute the nonpolitical side who [realize themselves] under the protection and shadow of political decisions .... The movement ... is state as well as people, and neither the present state (in the sense of a political unit), nor the present German people (as the subject of the political unit the 'German Reich') can even be conceived without the movement[24].

The administrative authorities of the state in this triple foundation consisted of the army and the civil service (officialdom)[25]. The movement or party recruited individuals from all levels of society[26].

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[22] Adolf Hitler, *Mein Kampf* (Unexpurgated edition; New York: Stackpole Sons, 1939), p. 379. Italics are Hitler's.

[23] *Ibid.*, p. 446.

[24] *SBV*, p. 12.

[25] *Ibid.*

[26] *Ibid.*, p. 13. When Schmitt spoke of the movement he had the party and the SA in mind (the SS did not yet play a visible role). Because of their

The people in this outline had a voice in matters pertaining to professional, social, economic and communal administrative problems[27]. In this triple foundation the movement or party, according to Schmitt, penetrated and led the other two. He maintained, however, that the three entities are neither identical nor separate, but "... move side by side, each according to its inner law and all in harmony with the political whole ...[28]."

Schmitt argued that after the emergence of the party as the dominant entity the dualist structure of state and society had been negated in favor of a triple foundation[29]. He noted that the Hegelian ideal of the independence of officialdom from society and its constituting the politically leading element was partially realized in nineteenth-century Prussia. But this ideal and practice was successfully challenged after 1848 by liberal constitutional and finally juristic-positivist ideas. The bureaucracy began to limit itself then to technical administrative and judicial functions, and these functions gradually became neutral in nature. After the turn of the century, and especially after 1918, officialdom became prey to the ever changing parliamentary majorities, and no longer stood above society but between the different classes. This perversion of the Hegelian *Beamtenstaat*, Schmitt argued, had come to an abrupt end. The Nazi party, according to Schmitt, overcame the Hegelian state, i. e., the independence of the monarch and officialdom, including the army. Under the Nazi structure political decisions no longer emanated from the state, but from the movement. Hence Schmitt's conclusion that in Germany the remnants of the

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higher status in Germany neither the party nor the SA, according to Schmitt, was subject to the control of ordinary courts. They were subject to their own systems of justice. See the provisions to this effect in the law on the "unity of party and state." *Reichsgesetzblatt*, I, No. 135, 1933, p. 1016.

[27] *SBV*, p. 13. The church is relegated to the sphere of the people. This holds true, according to Schmitt, as long as the church makes no political claim to differentiate between friend and enemy. *Ibid.*, p. 17.

[28] *Ibid.*, p. 32.

[29] In the nineteenth century on the continent, state and society were considered to be two distinct entities. Parliament served as a meeting place for the two but the state was, generally speaking, independent of the wishes of parliament. With the extension of the franchise and the growth of political parties, especially in the twentieth century, the state began to succumb to the wishes of the parliamentary parties for many of them made up the coalition government.

Hegelian state, and we may add the liberal constitutional state, died on January 30, 1933[30].

The law of December 1, 1933, on the "unity of party and state"[31] attempted to crystallize the new relationship between the two. Schmitt observed in this context that the party-state relationship rested

> primarily on personal unions .... These carry ... already marks of institutional character: the *Führer* of the National-Socialist movement is German Reichschancellor; his paladins and subleaders occupy other politically leading posts such as *Reichsminister*, Prussian Minister-President, *Reichstatthalter* ... etc.[32].

Furthermore, as a result of the above-mentioned law, Schmitt noted that the party then became a corporate body, but, Schmitt added, a corporate body in a higher sense than the many corporate bodies[33].

> To secure the closest cooperation between the organs of the party and the SA with the public bodies, the deputy of the Führer [Hess], and the chief-of-staff of the SA [Röhm], became members of the Reich government[34].

In his outline of the new constitution Schmitt maintained the importance of the party's not usurping the state's machinery, the army and civil service, as well as its functions. However, with the exception of a few vague remarks he himself undermined this by his observations which he sanctioned, namely the triple foundation of a political entity. The practice whereby top party members also assumed posts in the administrative sphere of the state was particularly bound to become subjugated to the politically dynamic element. It is true that the party never encroached upon many spheres of the state's activities[35], but this

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30 *SBV*, pp. 28 ff.

31 *Reichsgesetzblatt*, I, No. 135, 1933, p. 1016.

32 *SBV*, pp. 20—21.

33 "Under German public law, the corporation is but a relatively free institution. No corporations exist in public law that are not under the control of the state. Their tasks are clearly defined by law, the extent of their authority is strictly limited, and their activities come under the control of courts, administrative tribunals, and other agencies .... The actual development of the relation between the party and the state indicates that the concept of public corporation does not apply here." Franz Neumann, *Behemoth* (2nd ed.; New York: Oxford University Press, 1944), p. 68.

34 *SBV*, p. 20.

35 Ernst Fraenkel, *The Dual State* (Translated from the German by E. A. Shils, E. Lowenstein and K. Knorr; New York: Oxford University Press, 1941). Professor Fraenkel drew a distinction between the prerogative and the normative state. The former is defined as a "governmental system which

restraint was self-imposed, and, therefore, should not imply that the commands of the party or of powerful party members could have been ignored by the state agencies. In the same context it must also be remembered that the SA, despite its being part of the party in 1933, was in practice above it, and, therefore, not subject to the restraints imposed by the party upon itself.

Schmitt also addressed himself to several other aspects of the new constitution. One of the questions with which he was concerned was that of responsibility. Here he noted that the National-Socialist doctrine rested on the leadership concept. By virtue of the *Führer's* position at the apex of the movement, and because he was sole decision maker, he must, in Schmitt's view, be assisted by an advisory council chosen by him. However, under no circumstances could this council assume any responsibilities, for, in the final instance, Schmitt stated, all responsibilities must be assumed by the *Führer*[36].

Are there any safety valves against the *Führer* becoming a tyrant? To avoid tyranny Schmitt believed in maintaining a certain equality between ruler and ruled.

> On substantial equality *(Artgleichheit)* rests ... the continuous unbetrayable *(untrügliche)* contact between leader and led as well as their mutual trust. Only substantial equality may prevent the power of the *Führer* from becoming tyranny and caprice[37].

What Schmitt had in mind here was an idea he had already dealt with during the Weimar period, namely the direct democratic process. In this new situation Schmitt had hoped that the *Führer* could measure

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exercises unlimited arbitrariness and violence unchecked by any legal guarantees..." and the latter is "an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies" (p. xiii). According to Fraenkel, both coexisted in Germany. "The limits of the Prerogative State are not imposed from the outside; they are imposed by the Prerogative State itself." But, Fraenkel hastened to add, "legally the Prerogative State has unlimited jurisdiction" (p. 58). In practice its jurisdiction is limited, and Fraenkel argued that "to the extent that the Third Reich permits private enterprises to exist, National Socialism limits the scope of the Prerogative State. Regulated capitalism is characterized by state activity in the economic field; but generally, state intervention in this sphere is not of the type associated with the Prerogative State" (p. 61).

[36] *SBV*, p. 36.

[37] *Ibid.*, p. 42.

his popularity by submitting to the people certain questions. Here he did not dwell on the possibility of the *Führer's* resigning from office should he fail to receive widespread support. To assure such support Schmitt presupposed the existence of a homogeneous society — a topic he touched upon in the 1920's. He argued that for any democracy to be genuine it must not only be based on an identity between ruler and ruled, but it must also exclude heterogeneous elements. The new state would soon come to an end, he maintained, if the liberals and Marxists were permitted to participate in this democratic process. He also excluded from this process all racially dissimilar people[38].

To conclude this section it may be said that Schmitt's pamphlet *Staat, Bewegung, Volk* constituted not only an observation of what was beginning to emerge but also an attempt on his part to institutionalize a one-party state. Such an attempt is indeed interesting, but was in actuality a hopeless effort in Nazi Germany. Was his sketch of the National-Socialist system in accord with the actual facts at the time? Yes. Schmitt outlined the triple-foundation scheme many months after Hitler had come to power. Hence it was a keen observation and approbation of the emerging political situation in 1933 and, as it turned out, it was to an extent in accord with the facts thereafter. Nevertheless, his outline aroused controversy because it stated that the people form the nonpolitical element.

Höhn[39], Koellreutter[40], Neesse[41], among others argued that the people are the prime force, and that the people's will was embodied in the person of the *Führer.* Tatarin-Tarnheyden even objected to Schmitt's distinction between state, movement, people. The problem, according to Tatarin-Tarnheyden, was not how to differentiate the three elements, but how to fuse them[42]. With regard to the people specifically, none of these authorities explained exactly how they could

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38 *Ibid.*

39 Reinhard Höhn, *Vom Wesen der Gemeinschaft* (1934), pp. 16 ff. *Rechtsgemeinschaft und Volksgemeinschaft* (Hamburg: Hanseatische Verlagsanstalt, 1935), p. 75.

40 Otto Koellreutter, *Grundriss der Allgemeinen Staatslehre* (Tübingen: Verlag von J. C. B. Mohr [Paul Siebeck], 1933), p. 164.

41 Gottfried Neesse, *Partei und Staat* (Hamburg: Hanseatische Verlagsanstalt, 1936), p. 21.

42 Edgar Tatarin-Tarnheyden, *Werdendes Staatsrecht* (Berlin: Carl Heymanns Verlag, 1934), p. 25.

act. In fact, the people did act on a number of occasions about which we will now speak.

3. Nazi Constitutional Practice

A law concerning plebiscites was passed on July 14, 1933. Section 1 of this law stated that "The Reichsgovernment may ask the people whether they agree or disagree with an intended measure of the Reichsgovernment." And section 2 provided that besides measures, laws could also be the subject of plebiscites[43]. The significance of this law from the viewpoint of popular participation was that plebiscites could occur only if the government decided to submit certain questions to the people. No provisions were made for initiatives to take place.

As a matter of fact, a number of questions were submitted to the people and, accordingly, a number of plebiscites did take place. A plebiscite was held on November 12, 1933, on the question of Germany's withdrawal from the League of Nations and the Disarmament Conference. However, the withdrawal had already taken place on October 14, 1933. On August 19, 1934, a plebiscite was held on the question of amalgamating the office of the president with that of the leader and chancellor. A law with regard to the amalgamation had been passed combining the two offices on August 1, 1934 — one day before Hindenburg's death. On March 29, 1936, the German people were asked to approve Germany's march into the Rhineland which had occurred on March 7, 1936. Furthermore, on April 10, 1938, a plebiscite was held with regard to acts that were undertaken on March 11 and March 13, 1938, namely, the occupation and incorporation, respectively, of Austria into Germany[44].

On the question of the validity of plebiscites, Schmitt noted in 1933 that the government had no right to abrogate a law or measure which the people had willed into existence. According to Schmitt, the government was bound by this will, for he always believed in the

[43] *Reichsgesetzblatt*, I, No. 81, 1933, p. 479.

[44] Of interest to note is that no plebiscites took place as a result of Munich and the occupation of Czechoslovakia. For a discussion of some of the plebiscites see Henri Lichtenberger, *The Third Reich* (4th printing; Translated from the French and edited by Koppel S. Pinson; New York: The Greystone Press, 1939), pp. 68—69, 81.

omnipotence of the decision making power of the German people[45]. However, in the event that a law or measure originally brought forth by way of a plebiscite was no longer applicable because the situation for which it was intended had changed, the political leader had to decide in which form a new measure or law must be brought about, e. g., by a new plebiscite, a new election of the Reichstag, or a Reichstag or government law[46]. In this scheme everything really depended on the *Führer's* decision — whether to permit or prohibit the participation of the amorphous masses in approving or rejecting certain measures or laws.

Can we speak of the sovereignty of the people in Schmitt's construction? No. The people, to Schmitt, could make the decision of decisions, namely, under what kind of constitution they would like to live. This was the case in 1919 when the people decided upon a liberal-democratic constitution[47]. Again in March 1933, according to Schmitt, the people voted for the political leadership of Adolf Hitler and thus also for the endorsement of an enabling act[48]. But once a decision had been made, the people, said Schmitt, recede to the background until again called upon to decide on basic constitutional norms, laws, or just political acts. Do the people have a right to revolt? Schmitt makes no specific statement on this question. But from his overall construction at this time we must conclude that they do not possess this right. Schmitt feared Hobbes' *status naturalis* in which the *bellum omnium contra omnes* is an ever present threat.

In his outline of the triple foundation, Schmitt strongly implied that on questions pertaining to communal administrative matters initiatives could take place. However, in a one-party system such questions are of no interest, because the sole dominating party controls the communal administration as well. The leader could use all procedures at his pleasure and order an action to take place on any question whatsoever, irrelevant of whether it pertains to a local or a national question.

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45 *V*, pp. 23—24.

46 *SBV*, p. 11.

47 *V*, p. 24.

48 *SBV*, p. 7. Schmitt had in mind the election of March 5.

Chapter VII

Concrete – Order Thinking

Schmitt's polemics against Kelsen's normativism during the 1920's were resumed after Hitler's conquest of power. Under the new system Schmitt felt that his notions of concrete orders or institutions, as already touched upon in his *Verfassungslehre* (1928), and the essay "Freiheitsrechte und institutionelle Garantien" (1931), could now become the basis of a new legal system.

In Schmitt's previous attacks he had fought Kelsen's attempts to banish the concept of sovereignty by defining sovereignty in decisionist terms. Schmitt had aimed at bursting Kelsen's nonpolitical norm system by raising the challenge of the exception. But Schmitt realized as early as 1928 that his purely decisionist approach was insufficient[1], and therefore he began then to explore the possibilities of establishing a legal system based on concrete orders. He had hoped to bridge thereby the abyss which was created by Kelsen's antithesis between jurisprudence and politics. Herein lies the significance of Schmitt's legal concepts — sovereignty, state of exception, friend and enemy — for the political scientist.

1. Rescue of Political Thinking from Normativism

Schmitt had arrived at his friend-enemy criterion partly as a result of his polemics against nonpolitical normativism. He stated in this context that liberalism replaced the friend-enemy criterion in the economic domain by economic competition, and in the ethical sphere by discussion. By banishing the political, Schmitt asserted, liberalism was forced to regard leadership as nothing more than propaganda[2]. As applied to Weimar, the liberal-democratic constitution embodied nor-

[1] *V*, p. 170.

[2] *BP*, p. 58.

mative characteristics and thus the constitution blurred political leadership by subjecting it to norms. The concrete example was Hindenburg's indecisiveness in the face of actual danger to the Weimar republic.

After the National Socialists acquired power legally and even prior to the death of Hindenburg, whom the Nazis relegated to the position which Schmitt described as *qui règne et ne gouverne pas*[3], they overcame, according to Schmitt, the bankrupt *Beamtenstaat* which had failed at crucial moments to withstand the liberal-constitutional encroachments upon the state's domain. Moreover, the National-Socialist system had also overcome the liberal divorce between justice *(Recht)* and politics. The *sine qua non* of the Weimar system of justice had been the emphasis on the liberal principle of "equality before the law." According to Schmitt, one witnessed the result of this during the trial of Prussia vs. the Reich in 1932 when the Communists, the international foe of the national German state, and the National Socialists, a national German movement, were put on the same level. To have drawn any sharp distinction between the two movements, Schmitt observed, would have entailed, under the normative system, the violation of the principle of equality before the law[4]. In other words, for justice to be true justice, according to Schmitt's reasoning, politics — the distinction between friend and enemy — must be its guiding force. This criterion need not only apply to a domestic political party, but also to individuals who may be considered undesirable. The unfortunate consequences of this approach to justice in a totalitarian state became apparent all too soon.

Another normativist concept the National Socialists overturned was, according to Schmitt, the liberal concept of supervision[5]. Although

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[3] *SBV*, p. 10.

[4] *Ibid.*, p. 37. In 1932 Schmitt, too, supported the government's position against extremists which included the National Socialists. But to this apparent contradiction in Schmitt's thinking regarding the July 20, 1933 affair we must bear in mind Schleicher's involvements in many political fronts. Nevertheless, Schleicher's hope was to avoid a National-Socialist or a Communist coup by a third alternative, namely, some constitutional revisions along authoritarian lines. If presented with the alternatives of international Communism or a national movement such as National Socialism, Schleicher's as well as Schmitt's answer would have been in favor of the latter. However, such distinctions cannot be drawn under normativist legal procedures, for everyone must be treated equally.

[5] *Ibid.*, p. 38.

Schmitt did not define the meaning of supervision, he illustrated the practical aspects of it. He pointed out that Bismarck's constitution of April 18, 1871, was a constitution which assumed the hegemony of Prussia, i. e., its political leadership over the rest of the Reich. Liberal constitutional terminology and legal interpretation considered this to be an example, as H. Triepel put it, of a supervision by the Reich *(Reichsaufsicht)* over the states. Schmitt observed in this context that the Weimar constitution eliminated Prussian hegemony entirely, and as such the last vestige of leadership. This was crowned by the introduction of the German Supreme Court (Article 19, Weimar constitution). Among other functions, this body could arbitrate disputes between states or between the Reich and a state or a number of states. Johannes Heckel referred to this as a case of constitutional supervision *(Verfassungsaufsicht)*[6]. According to Schmitt, the banishment of the leadership concept by dissolving everything into a set of norms constituted a victory for liberalism. At least under the Bismarck constitution, Schmitt argued, one could still recognize the Reich which supervised the different states. Under the Weimar constitution neither the Reich nor the states came to the fore prominently, only the standard of constitutional supervision played a role and disputes were decided upon by the court. "The result is always the *administration of law (Justiz) instead of political leadership*[7]." Schmitt stated rather romantically that in Germany the leadership concept had been reintroduced in 1933, and he observed that it was difficult for non-Germans to understand what was meant by the German concept of political leadership. In National-Socialist Germany "this concept of leadership," according to Schmitt, "stems entirely from the concrete ... thinking of the National-Socialist movement[8]."

Schmitt's views on the death of normative thinking in Germany culminated in the *Rechtsstaat* controversy, on the one hand, and on the other, in his outline of a new legal order based on concrete institutions. He argued that the *Rechtsstaat* always presupposed the institution of the state and, therefore, it did not matter, according to him, whether the state was monarchical or democratic. However, since the *Rechtsstaat* was a servant of society by stressing the rights of

[6] *Ibid.*, pp. 38—39.

[7] *Ibid.*, p. 40. Italics are Schmitt's.

[8] *Ibid.*, p. 42.

bourgeois individualism[9], and since it emphasized the principle of the separation of power in which the judiciary played a significant role[10], Schmitt concluded that the Nazi state was not a *Rechtsstaat*. Hitler's appointment on January 30, 1933, the suspension of individual rights on February 28, 1933, and the abandonment of the separation of power principle when, on March 24, 1933, the executive was given the right to promulgate ordinary and constitutional laws, contravened the republican spirit of the constitution. Therefore, Schmitt observed, rather than calling the National-Socialist state a *Rechtsstaat* one should refer to it as a "just state[11]."

Although the Nazi regime abrogated implicitly and explicitly many parts of the Weimar constitution and replaced these with new ones, it was National-Socialist practice not to mention the abrogation of the constitution. The stress upon continuity growing out of previous periods was always accented because of the Nazis' instinct for legality. Hence Schmitt's conclusion that the National-Socialist state was not a *Rechtsstaat* was officially repudiated. Hans Frank declared in 1934 that the German state is the "'German Rechtsstaat of Adolf Hitler[12].'"

Because of this declaration Schmitt reconsidered his evaluation of the *Rechtsstaat*. He now called attention to the fact that the term *Rechtsstaat* was defined by Robert Mohl in 1832. According to Schmitt, in the early part of the nineteenth century the term *Rechtsstaat* had a polemical meaning, for Mohl referred to it as a state which was neither a theocracy nor a Prussian civil-service state. Subsequently, Schmitt observed, the conservative Friedrich Stahl (Jolson) discredited the Hegelian state and incorporated into his type of state certain Christian elements, and he defined a *Rechtsstaat* to be a state which contains no aim as such but attempts only to realize one. Thus, in Schmitt's view, any state may be called a *Rechtsstaat*[13]. The essential point was that, no matter whether it was a Christian *Rechtsstaat* or

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[9] *V*, p. 125.

[10] *Ibid.*, pp. 130 ff.

[11] Carl Schmitt, "Nationalsozialismus und Rechtsstaat," *Deutsche Verwaltung*, No. 3, 1934, p. 36.

[12] Hans Frank, "'Der deutsche Rechtsstaat Adolf Hitlers,'" *Deutsches Recht*, No. 6, 1934, p. 121.

[13] Carl Schmitt, "Was bedeutet der Streit um den 'Rechtsstaat'?" *Zeitschrift für die gesamte Staatswissenschaft*, Vol. 95, Heft 2, 1935, pp. 190—192. See also *V*, pp. 125—126.

any other type, the state had to be subjugated to law *(Recht)*. Schmitt insinuated that this type of state was not a true German one, but a Jewish state of Stahl (Jolson), Lasker and Jacoby[14]. This form of state was a *Gesetzesstaat* which, according to Schmitt, divorced right *(Recht)* from law *(Gesetz)*[15]. The National-Socialist victory spelled the end of this state and, therefore, Schmitt pointed out, rather than refer to the Nazi state as a "just state" as he had done previously, one must refer to the new German state as a "National-Socialist *Rechtsstaat*," a "National-Socialist German *Rechtsstaat*," or, as Hans Frank stated: "'The German *Rechtsstaat* of Adolf Hitler[16].'"

What promised to be an interesting discussion on the meaning of the *Rechtsstaat* concept in the nineteenth and twentieth centuries, and especially on what type of state the National-Socialist state was, soon deteriorated into acceptance of Frank's formulation[17]. The bankruptcy of thought on this topic became even more apparent in 1935. One of Schmitt's docile disciples, Günther Krauss, maintained then that the nineteenth-century *Rechtsstaat* could not only be equated with Rothschild and Jolson[18], but that it was also a "principle of robbery[19]," and a "powerless state[20]."

Despite the quibbles about words explaining the nature of the German National-Socialist state, the fact remains that it was not a *Rechtsstaat* in the western liberal sense of the word. Although Schmitt's formulation was rejected, Schmitt must, nevertheless, have been delighted. Now he finally witnessed the emergence of a strong

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[14] Carl Schmitt, "Was bedeutet der Streit um den 'Rechtsstaat'?" p. 193. This argument should not be dismissed as mere propaganda. Behind this statement was the thought that Jews as an alien element in a comparatively homogeneous Christian country could best realize "equality" if they were protected by laws. Therefore, the argument runs, it is not strange to find Jews in the Diaspora on the side which stresses the omnipotence of law rather than the will of an individual.

[15] *Ibid.*, pp. 191—192, 196.

[16] *Ibid.*, p. 199.

[17] For a concise outline of the various positions on the *Rechtsstaat* see Kurt Gross-Fengels, *Der Streit um den Rechtsstaat* (Marburg: Nolte, 1936).

[18] Günther Krauss, Otto von Schweinichen, *Disputation über den Rechtsstaat* (Introduction by Carl Schmitt; Hamburg: Hanseatische Verlagsanstalt, 1935), p. 19.

[19] *Ibid.*, p. 28.

[20] *Ibid.*, p. 31.

political entity in which centrifugal forces were eliminated and genuine leadership introduced. In his polemics against normativism and a president whose hands were tied he always stressed the necessity of strong guidance from above. That Hitler rather than anyone else became the leader of Germany was due to Weimar's self-imposed death sentence. The last event in this process occurred on March 23, 1933. On this day the Reichstag gave Hitler an unprecedented enabling act, something it had refused to give his predecessors.

2. Institutionalism Against Normativism and Decisionism

The thesis which Schmitt outlined in 1934 was his *konkretes Ordnungs- und Gestaltungsdenken*[21]. He contrasted concrete-order thinking with two other types of juristic possibilities, normativism and decisionism. The fusion of the latter two, according to Schmitt, produced nineteenth-century positivism.[22] Each of the three types — normativism, decisionism and concrete-order thinking — is contained in law, according to Schmitt, but the emphasis differs in the various legal systems[23].

Schmitt maintained that it is important to know whether law is understood as norm, decision, or in concrete-order terms[24]. The outstanding characteristic of normativist thinking is the fact that laws and not men govern. The norm is isolated and made absolute, and hence a degree of objectivity is assured[25]. The concrete expression of this approach is found in the decision of the fathers of the American constitution who provided for a government of law and not of men. Thus what is generally understood to be a *Rechtsstaat*, Schmitt concluded, is nothing else than a *Gesetzesstaat*[26]. For the normativist the norm produces right.

Hobbes is the classic example of decisionist thinking. This type of thinking presupposes a state of nature in which the *bellum omnium contra omnes* and the *homo homini lupus* are the outstanding features.

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[21] *DA. Gestaltungsdenken* refers to law which is in a continuous process of formation.

[22] *Ibid.*, p. 29.

[23] *Ibid.*, p. 7.

[24] *Ibid.*, p. 11.

[25] *Ibid.*, p. 13.

[26] *Ibid.*, p. 14.

For Hobbes the state of nature is a state of emergency. The transition from this state to civil society is the absolute beginning of every norm. "It arises from a normativist nothing," according to Schmitt, "and a concrete disorder[27]." For the decisionist, it is the first decision that produces order, peace and right.

As has already been mentioned above, nineteenth-century juristic positivism is a result of the fusion of decisionism and normativism. Schmitt maintained that the norm itself rather than the will of the lawgiver is here of paramount importance. This type of thinking stresses the advantage of assuring "objectivity, constancy, inviolability, security and calculability" in the legal process[28]. But it is well worth remembering, Schmitt pointed out, that the positivist lawyers submit themselves to the decisions of the state's lawgiver. No matter who the lawgiver may be, Schmitt stressed, the sole point to remember is that to the positivist it is important that these decisions continue to have the validity of unbreakable norms[29]. Hence for the positivist right is produced by the legal norms in existence at a particular moment.

After 1933, according to Schmitt, concrete-order thinking was again becoming a juristic possibility in Germany. Schmitt contended that concrete-order thinking had prevailed in Germany until Roman law became dominant in the fifteenth century. Until then it was customary to think in concrete-order terms. Knights, farmers, burghers, clergymen, among others, were all members of orders *(Stände)*, and an individual was subject to the norms of the particular order to which he belonged. But with the appearance of the *Corpus Juris* the facts of a particular case and concrete-order thinking gave way to ready made decisions and abstract norms. Nineteenth-century juristic positivism has further undermined concrete-order thinking[30]. However, according to Schmitt, concrete-order thinking never vanished entirely in Germany.

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[27] *Ibid.*, p. 28. In Schmitt's view the transition from the state of nature to civil society in Hobbes is as follows: "The terror of the state of nature drives the fearful individuals together; their fear heightens itself to an extreme; a spark of light of the *ratio* flashes — and suddenly the new God stands in front of us." Carl Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes: Sinn und Fehlschlag eines politischen Symbols* (Hamburg: Hanseatische Verlagsanstalt, 1938), p. 48.

[28] *DA*, p. 31.

[29] *Ibid.*, p. 35.

[30] Carl Schmitt, "Nationalsozialistisches Rechtsdenken," *Deutsches Recht*, No. 10, 1934, p. 226.

> Luther defended vigorously and knew how to preserve . . . the natural orders of marriage, family, order, person and office *(Amt)* against theological, moral and juristic normativizations. His sentence: 'Are you a mother'? then do what is your duty as a mother . . . . [This] brings beautifully to the fore the superiority of . . . concrete-order [thinking] to that of abstract normativism. This sentence is valid not only for the mother, but for every order . . .[31].

Schmitt continued to argue that even in the eighteenth century concrete-order thinking was an important element in Prussia. The Prussian *Landrecht* of 1794, Schmitt pointed out, stressed concrete institutions, i. e., the church, the orders, the family, the family-community *(Hausgemeinschaft)* and marriage, and did not view these institutions as merely functions of lawful regulation[32]. Moreover, Schmitt emphasized the attempts to preserve institutional thinking by Fichte (in his late period), and Savigny culminating in Hegel's state which is, according to Schmitt, "the concrete order of orders, the institution of institutions"[33] and not just a set of abstract norms.

Schmitt's concrete-order concept is essentially similar to the various corporate theories advanced by a number of Germans. For example, in Hegel's structure the business class, because of its particular interests, is organized in a series of corporations[34]. These were, in turn, represented in a lower house of "parliament[35]." The agricultural class was represented in an upper house[36]. These organized entities were confronted by the universal class or the class of civil servants which, according to Hegel, has in mind "the universal as the end of its essential activity," and therefore this class constitutes the governing element[37]. As has been previously noted, Schmitt already suggested prior to 1933 that the concrete orders be organized in to a kind of upper house in which they could discuss their mutual interests and arrive at definite decisions. His major deviation from Hegel came when he saw no essential need for two houses, and Schmitt's universal,

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31 *DA*, pp. 42—43.

32 *Ibid.*, p. 44.

33 *Ibid.*, pp. 44—47.

34 G. W. F. Hegel, *Philosophy of Right* (Translated with notes by T. M. Knox; Oxford: At the Clarendon Press, 1953), paragraph 250, p. 152.

35 *Ibid.*, paragraph 302, p. 197; also pp. 372—373.

36 *Ibid.*, paragraph 307, p. 199;. also pp. 372—373.

37 *Ibid.*, paragraph 303, pp. 197—198.

if we may call it as such, was incorporated in the *Führer's* personal will[38].

In observing what had happened in Germany after 1933 Schmitt believed that the National-Socialist system was in the process of moving in the right direction. He maintained that each order or institution would have to be organized along professional or political lines, and that each order would abide by its own system of honor and discipline. He also thought that the SA and SS could be organized along similar lines[39]. Precedents had already been established with the army[40] and farmers[41]. But, Schmitt warned, every order must be permeated by National-Socialist thinking[42], and to avoid the pluralist consequences, i. e., the development of independent entities within the political unit, a strong state must be the prerequisite. Schmitt asserted that the strength of the National-Socialist state lies "in that it is ruled and permeated from top to bottom and in every atom of its existence by the leadership principle[43]."

By furthering the theory of institutions or concrete orders (with modifications of Maurice Hauriou's, George Renard's[44] and Santi

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[38] Gierke and Hauriou, too, had something to say about corporations. Both viewed society as essentially divided into a number of associations or institutions as Hauriou called them. The main difference between them was that Gierke was not a pluralist. He still thought of the state as an extremely important corporate unit, while Hauriou, by not integrating his institutions into the state, remained a pluralist.

[39] *SBV*, p. 33.

[40] Military judicial jurisdiction *(Gerichtsbarkeit)* was introduced on May 12, 1933. *Reichsgesetzblatt*, I, No. 50, p. 264.

[41] The "Hereditary Farm Law" of September 29, 1933, established an estate of farmers with its own system of courts. *Reichsgesetzblatt*, I, No. 108, pp. 685—692. The same occurred in the Labor Front. Courts of honor were created. These had jurisdiction over offenses which were considered to constitute a breach of social honor. *Reichsgesetzblatt*, I, No. 52, 1933, p. 285, and *Reichsgesetzblatt*, I, No. 7, 1934, pp. 50—51.

[42] *SBV*, p. 36.

[43] See also *DA*, p. 63.

[44] For a detailed discussion of concrete-order thinking see E. Schwinge and L. Zimmerl, *Wesenschau und konkretes Ordnungsdenken im Strafrecht* (Bonn: Ludwig Röhrscheid, 1937). The authors point out the influence of Hauriou and Renard on Schmitt. They state that the institution theory is based on Plato's model (p. 17), on Bergson's thought of constant change and new creation of law and his "sharp rejection of the abstract normativist scheme of

Romano's understandings of institutions), Schmitt had hoped to perpetuate a system of justice in Germany which would have negated what he considered the "unjust" normativist approach of subsuming every legal case to existing norms. He argued for the introduction of a concept of justice based on the practices of members in a given order. This type of justice would not only have overcome the liberal legal achievement of separating morality from justice, but it would also have introduced a concept of institutional justice which would, he noted, survive major political upheavals because the practices of such orders cannot be destroyed as easily as a political system.

Schmitt maintained that in concrete-order thinking the rule or norm is not the basis, but only an integral part of the total institutional order[45]. The term "Nomos basileus" does not mean, according to Schmitt, law as king as the normativists interpret it, but "'Nomos'" contains in it norm, decision and institutional order. Hence, "concepts such as king, ruler, overseer, or governor, and also judge and court of justice" are no mere abstractions, but "concrete institutional orders[46]." A true *Nomos* as king "can only then be spoken of when *Nomos* ... means concrete order and community with an all inclusive concept of right *(Recht)*[47]." This should not imply, however, that general rules or norms do not exist. Schmitt pointed out that a general rule

> should ... be independent and rise above the individual case, because it has to regulate many cases and not only one .... [A general rule should] rise only to a very limited degree ... above the concrete situation. If it rises above this [limited degree], then the general rule can no longer be applied to the case which it ought to put in order. The rule then becomes senseless ...[48].

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the nineteenth-century positivist jurisprudence" (p. 18), and the social philosophy of St. Thomas Aquinas who, as Renard said, "'baigne dans l'atmosphere institutionelle'" *(ibid.)*. With regard to Hauriou, Schmitt stated that "he had observed, discussed, directed and scientifically further developed ... the practice of French administrative law, especially the decisions of the *Conseil d'État* .... This ... observation of a concrete order" culminated in his outlook on institutions. However, the belief in institutions presupposes, Schmitt stressed, a "situation établie." *DA*, pp. 55—56.

[45] *DA*, p. 13.

[46] *Ibid.*, p. 15.

[47] *Ibid.*, p. 16.

[48] *Ibid.*, p. 23. Concrete-order practice was also introduced in criminal law. The Phenomenological School shares in its theoretical foundation "Carl Schmitt's attack on general conceptions, on normativism and positivism, and stresses, instead, the concrete order of life. Intuition and essence are introduced

Bearing in mind Max Weber's three well-known types of legitimacy — charismatic, traditional and legal — Schmitt in his concrete-order scheme never really toyed seriously with the charismatic nature of legitimacy. As we have previously seen, the legal became an independent and even destructive antithesis to legitimacy in the form of normativism. What remains therefore is traditional legitimacy: German officialdom, the army and communal administration.

However, a basic contradiction appears in Schmitt's thinking. Besides constantly stressing the traditional institutions, he mentioned parenthetically in 1933 that the SA and the SS should also form institutions[49]. Yet both groups rested their *raison d'être* on charisma, and nowhere did Schmitt resolve this inconsistency between a rational and charismatic legitimacy.

With regard to legality Schmitt reduced it essentially to one moment of legitimacy. Thus legality became nothing else than an outgrowth of legitimacy. Furthermore, Schmitt assumed that although the *Führer* was competent to make the decision of decisions about whether an exception or emergency existed and then act accordingly, in normal times he would, nevertheless, have hesitated to interfere directly in the operational process of the concrete orders. However, in totalitarian systems such an assumption cannot be made since the entire political order is at the mercy of the leader or party.

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as the true method of discovering the criminal agent." Otto Kirchheimer, "Criminal Law in National-Socialist Germany," *Studies in Philosophy and Social Science*, Vol. VIII, 1939/40, p. 445. See also Ottmar Ballweg, *In einer Lehre von der Natur der Sache* (Basel: Helbing & Lichtenhahn, 1960), p. 39.

[49] *SBV*, p. 33.

Chapter VIII

Army, Party, State

After Hitler had eliminated the political opposition on July 14, 1933, it appeared that he intended to transform the National-Socialist revolutionary phase into an evolutionary one. He announced this change of policy in several speeches in July 1933[1]. But differences of opinion within the National-Socialist party about the purpose and aim of the revolution prevented Hitler from being certain of his power. Hence a latent state of emergency existed throughout 1934. This emergency situation had prevailed since February 28, 1933, and lasted, with few intervals, until Germany's defeat in May 1945.

The two opposing forces, in 1933 and 1934, were the *Reichswehr* and Röhm's SA. Röhm, as head of the SA, demanded that the *Reichswehr* be incorporated into the SA, and that the latter take over the *Wehrmacht's* function. In this controversy Hitler maneuvered prudently and, despite his previous declarations against a small army of paid professional soldiers or mercenaries *(Söldnertruppe*[2]*)*, he courted the *Reichswehr* and attempted to suggest his respect for the old Prussian military tradition incorporated in it. His official respect for Hindenburg was also a contributing factor.

1. The Prussian "Soldier-State"

On January 24, 1934, Schmitt delivered a public lecture at the University of Berlin commemorating the birthday of Frederick the Great. This lecture was published in May 1934 under the title *Staats-*

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[1] Hermann Mau, Helmut Krausnick, *Deutsche Geschichte der jüngsten Vergangenheit, 1933—1945* (2nd ed.; Stuttgart: J. B. Metzlersche Verlagsbuchhandlung, 1956), p. 51.

[2] The German term *Söldner* is pejorative while the word *Soldat* — although etymologically derived from the same root *(sold)* — sounds respectable.

gefüge und Zusammenbruch des zweiten Reiches: Der Sieg des Bürgers über den Soldaten[3]. In the course of the lecture Schmitt returned to the pre-Weimar period when the state, in his opinion, had not yet succumbed to civil society. At the same time, however, he pointed out the moments when the pre-Weimar state had faltered. This, he hoped, would be a warning not to make similar mistakes in the new state.

The Prussian state, according to Schmitt, was a "soldier-state[4]." It had its most glorious period when the German people were under the political leadership of the monarch. Since the German people had soldierly qualities not possessed by other people, the Prussian general staff, he maintained, was an integral part of the "soldier-state." But after 1848, he argued, the liberal movement, with its ideas of constitutionalism and parliamentarianism, began to make heavy inroads into the Prussian state structure[5].

In spite of great difficulties, the Prussian "soldier-state" continued for some time to hold its own against the liberal onslaught. The army did not have to take an oath to the constitution, but continued to take a personal oath to the king as supreme warlord. Ministerial countersignature on matters pertaining to the command of the army was also excluded from the constitutional realm[6]. But, nevertheless, there were three moments when, according to Schmitt, the "soldier-state" wrote its own death sentence: (1) August 5, 1866, (2) August 4, 1914, and (3) October 28, 1918[7].

The events which led up to the August 5, 1866, question centered on the military and budgetary conflict of 1862—1866. In these years the Prussian government undertook army reforms against the will of the Landtag. For the unilateral action undertaken, Bismarck, after the victories of 1864 and 1866, asked for and received exoneration *(Indemnität)* from Parliament on August 5, 1866[8]. To have asked for exoneration was, in Schmitt's view, a cardinal mistake, for this constituted an invitation to the liberal opposition to assert itself and make, by way of the budget, further parliamentary inroads into the "soldier-state[9]."

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[3] (Hamburg: Hanseatische Verlagsanstalt, 1934). Hereafter: *SZR*.
[4] See also the reference to Prussia as a *Beamtenstaat* (VI, 2).
[5] *SZR*, pp. 8—9.
[6] *Ibid.*, p. 14.
[7] *Ibid.*, p. 42.
[8] *Ibid.*, pp. 10, 20—21.
[9] *Ibid.*, p. 41.

Spiritual submission to the constitutional ideology of western liberal democracy and to the domestic adversaries of the Prussian "soldier-state" came, according to Schmitt, on August 4, 1914, when Chancellor Bethmann-Hollweg justified in the Reichstag Germany's war against Russia, but condemned the invasion of Belgium and labelled it an unjust act which would have to be made good. Only "childish emergency jurisprudence," Schmitt claimed, can be held responsible for such apologies[10].

The final blow of the "soldier-state" came with the constitutional reform laws of October 28, 1918[11]. These laws, among others, provided for: (1) the responsibility of the Chancellor to the Reichstag and Bundesrat; (2) stated that the Emperor could no longer declare war; and (3) put the Emperor as military commander under parliamentary control[12]. These reforms eliminated the last vestiges of what he called a noble tradition[13].

It is relatively unimportant whether Schmitt's thesis of the Prussian "soldier-state" is correct, or whether Fritz Morstein Marx's conclusion, that it would be more appropriate to call Prussia a "civil-service state," is more accurate[14]. Schmitt would be the first to admit that he overstated his thesis, as he usually did, but in so doing he wanted to focus attention on the three moments he believed to have been responsible for having sealed the fate of the "soldier-state." His general reason for bringing up the topic in 1934 was to provide a frame of reference and a sense of historical continuity in a setting which, he thought, offered vast possibilities for creating a new constitutional framework[15] in which the *Reichswehr* could play an important part.

The immediate situation to which Schmitt alluded was the position of the *Reichswehr* vis-à-vis the encroachments by the SA[16]. The

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[10] *Ibid.*, pp. 41—42.

[11] *Ibid.*, p. 40.

[12] René Brunet, *The New German Constitution* (Foreword by Charles A. Beard; New York: Alfred A. Knopf, 1928), pp. 10—11.

[13] *SZR*, p. 40.

[14] *Government in the Third Reich* (Foreword by W. Y. Elliott; 2nd ed.; New York: McGraw-Hill Book Company, Inc., 1937), p. 22.

[15] *SZR*, p. 49.

[16] The friction between Röhm and Hitler was already fairly well known by the spring of 1934. See Hermann Mau, Helmut Krausnick, *Deutsche Geschichte . . .*, p. 52.

allusion to the conflict between the two bodies may be seen not only in his constant praises of the Prussian general staff and the army in general as well as the avoidance of any reference to the SA, but also by his statement that Hitler, a German World War I soldier who was simultaneously also a political soldier, was appointed chancellor by another soldier of World War I, Field Marshal Hindenburg[17].

In Schmitt's attempt to strengthen the *Reichswehr's* position he had hoped to preserve an institution which had behind it a long tradition, and make it a pillar of the state in the one-party structure. Early in 1934 one could not foresee whether the *Reichswehr* would emerge victorious in the struggle with the SA and that Schmitt's position would be confirmed.

The *Reichswehr* and the SA struggle came to a sudden head on June 30, 1934. Röhm's demand that the *Reichswehr* be incorporated into the SA was not acceptable to Hitler. But the instrument which Hitler utilized to crush the SA was the new emerging force, the SS. Despite the fact that the *Reichswehr* did not actively intervene, they were under the illusion of having won a decisive victory over a dangerous rival[18]. Schmitt was also under the wrong impression and did not see that the real danger came neither from the SA nor the National-Socialist party, but from the SS. By his lecture of January 24, 1934, he had exposed himself imprudently. It appears that this fact was utilized by Himmler in January 1935 to link Schmitt with General von Fritsch, Chief of the General Staff, in a *Putsch* which was to have taken place and which Schmitt supposedly had justified legally (See IX, 2).

Schmitt's option for the *Reichswehr* was consistent with his outline of state, movement, and people. To the domain of the state, the politically static part, must belong the army, and by definition policy cannot emanate from the politically static part. For an army there is no way of being static or non-political other than by obeying the political leader. Every refusal of obedience turns it into a political force. Moreover, Schmitt's consistency can be traced to his writings immediately preceding the Nazi victory. Already then he argued for the necessity of making the *Reichswehr* into a significant pillar of the state's structure.

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[17] *SZR*, p. 49.

[18] Hermann Mau, Helmut Krausnick, *Deutsche Geschichte . . .*, pp. 58 ff.

What had actually changed in Schmitt's theory was his substitution of the *Führer* for the president and chancellor. Naturally, the *Führer* as the decision maker was not bound by any liberal philosophical and liberal juristic norms or laws. Under the new system the state's machinery — the army and the civil service — was relegated to the important task of executing the orders of the *Führer*. It may certainly be argued that Schmitt's triple foundation left the door open for the state's demise by giving absolute power to Hitler. However, as has already been pointed out, because of the traditional significance of the state in modern German history Schmitt implicitly assumed that the new element — the party and its *Führer* — would not only respect this tradition, but never usurp its duties. What had actually happened in the ensuing years was that Germany turned into a totalitarian one-party system, and the state had been crushed almost entirely by Hitler and his SS entourage. The last attempt made to regain its honor was the abortive attempt on Hitler's life in July 1944.

2. The Führer Protects Right

The events of June 30, July 1 and 2, 1934, are well known. Röhm and the prominent SA chiefs were murdered. But other opponents of the regime too were eliminated, including Gregor Strasser. The murder of General von Schleicher is particularly significant in this context. Schmitt used the death of his friend as a motive to write a tract which subsequently became one of the most critized contributions he made during the Hitler period.

As is well known, the procedure utilized to eliminate the SA treachery bordered on pure violence. However, Hitler's instinct for legality made him legalize the deeds of June 30, July 1 and 2, in the form of a government law which was promulgated on July 3, 1934[19]. This procedure was in accord with the enabling act of March 24. Legalization by way of Article 48 had not been taken into consideration, because the enabling act superseded Article 48 and offered much wider possibilities which Hitler gratefully utilized. In reflecting upon this game of legalism, one is reminded of the devil exorcised by Beelzebub. Not content with the government law of July 3, Hitler

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[19] *Reichsgesetzblatt*, Vol. I, No. 71, 1934, p. 529.

stated before the Reichstag on July 13, 1934, that in those hours of danger he took it upon himself to be the supreme judicial authority *(oberster Gerichtsherr)*[20].

Hitler's role during this emergency constituted the subject of Schmitt's article "Der Führer schützt das Recht[21]," published in August 1934. In this short exposition, one month after the government law, and more than two weeks after the Reichstag speech, Schmitt distinguished the two kinds of justification — the government law of July 3 referring to the enabling act, and the new claim by Hitler of being supreme judge. The latter implied that the deeds that occurred emanated from Hitler, and hence he was solely responsible and could not, in Schmitt's view, ask for exoneration from the Reichstag[22].

But during and after those three days, murders were committed which had no connection with the elimination of the SA treachery. Schmitt was interested in the punishment of the culprits, and therefore the title of Schmitt's article was not an assertion but a postulation. In his speech of July 13, Hitler admitted that acts of violence had taken place outside the frame of the emergency, and he promised that the individuals responsible for these crimes would be punished by the courts[23]. Hence Schmitt stated that the "Führer protects the law from the worst abuse when he, in the moment of danger . . ., as highest judge, produces immediate justice *(Recht)*[24]."

Schmitt was thus carefully and deliberately recalling the fact that criminal deeds committed outside the frame of the treachery had not been satisfactorily dealt with. He prudently warned that precautions must be taken to prevent such excesses in the future[25]. Schmitt had particularly in mind Schleicher's murder. Although in his Reichstag speech on July 13, Hitler claimed that Röhm had Schleicher's blessings for a revolt, Schmitt was unwilling to accept this explanation regarding his friend. The reason for having eliminated him was, according to

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20 *Verhandlungen des Reichstags* (Berlin, 1936), Band 458, p. 30.

21 In *Positionen und Begriffe im Kampf mit Weimar — Genf — Versailles 1923—1939* (Hamburg: Hanseatische Verlagsanstalt, 1940).

22 *Ibid.*, p. 200.

23 *Verhandlungen des Reichstags*, p. 71.

24 "Der Führer schützt das Recht," p. 200.

25 *Ibid.*

Walter Schellenberg, that Schleicher knew too much of the shady financial transactions which preceded Hitler's rise to power[26].

Otherwise Schmitt was quite consistent when he justified Hitler's action against the SA. He was convinced that civil war might have erupted had Röhm and his entourage not been eliminated. Speaking generally, Schmitt's article should be approached from the viewpoint of sovereign dictatorship. He declared as early as 1933 that the Weimar constitution was dead, but he was refuted by genuine Nazi legal theorists. Hitler's violations of the enabling act — the elimination of the Reichsrat and the outlawing of all political parties except the National Socialist — leave no doubt that he was in fact sovereign and also sovereign dictator. Neither terms — sovereign or sovereign dictator — appear in Schmitt's article, although his entire argument leads to this conclusion. The events of June 30, 1934, confirmed Hitler's absolute possession of power. This has also been stated in the judgment of the International Military Tribunal on October 1, 1947[27].

In view of these events can one still speak in terms of a state of exception in the Weimar constitutional sense, or in any other constitutional sense? No. Can one speak of a state of emergency? Yes. A major emergency did apparently exist, and *necessitas non habet legem* (see Preface). Hitler mercilessly utilized the emergency to solidify and augment his power. A parallel may be drawn with his utilization of the Reichstag fire of February 1933, when a state of exception was shamelessly exploited. Schmitt's article certainly sanctioned Hitler's actions with the sole reservation that, although *potestas facit legem*, crimes committed outside the legal frame must be adequately dealt with. Since he knew Hitler's methods, Schmitt's article, which constituted in effect an appeal to Hitler's sense of responsibility, is somewhat naive.

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[26] *The Schellenberg Memoirs* (Introduction by Alan Bullock; London: Andre Deutsch, 1956), p. 24.

[27] See Carl Schmitt, "Das Problem der Legalität" (1950), *Verfassungsrechtliche Aufsätze: Materialien zu einer Verfassungslehre* (Berlin: Duncker & Humblot, 1958), p. 442.

Chapter IX

Theology, Defeat, and the Benito Cereno Myth

In the years 1933—1934 Schmitt published three brochures — *Staat, Bewegung, Volk, Staatsgefüge und Zusammenbruch des zweiten Reiches* and *Über die drei Arten des rechtswissenschaftlichen Denkens.* A few short articles previously discussed dealing with the *Rechtsstaat* appeared in 1935. In 1935 and 1936 Schmitt touched upon the Jewish question in several additional short articles.

When speaking of some basic conviction which the German people entertained during the Nazi period, it is possible to point to an anti-Jewish attitude, or what is known in common parlance as anti-Semitism. This was not invented by the Nazis, but Nazi practice implemented the belief that the Jews belonged to an inferior race. In fact, their concept of racial gradation did not apply to Jews only. At the bottom of the Nazi *Übermensch — Untermensch* belief were the Jews, and it was upon them that the Nazis practiced "political biology[1]."

The Nazi treatment of Jews can be divided into two phases: (1) the period between 1933 and November 1938 during which the Germans applied economic pressures against Jews (violent outbreaks were not yet large scale practice), and (2) the period of violence which commenced at the end of 1938 and culminated in the mass extermination of Jews.

During the first phase German Jews provided convenient targets upon which the Germans could relieve their tensions. The situation of the Jews was almost analogous with Sorel's bourgeois class. The Jews

[1] To prove the inferiority of Jews the Nazis enlisted the aid of biology, a genuine science. Since a myth cannot be put on a scientific footing, the Nazi enterprise concerning the Jews must, therefore, be referred to as "political biology." For an excellent discussion of Volkish ideology prior to the Nazi period see George L. Mosse, *The Crisis of German Ideology: Intellectual Origins of the Third Reich* (New York: Grosset & Dunlap, 1964), pp. 126 ff.

were objects to be despised, to be put in their place, and occasionally to be attacked physically. They served as a constant reminder to the German people that within their territory lived an adversary who must be watched and feared.

1. Catholicism versus Judaism

It was during the first period that Schmitt entered the scene. In commenting on the Nuremberg laws of September 1935, Schmitt confined himself to stating that foreign Jews were of no concern to the German people, but marriage of Germans with Jews, wherever they may be, is now prohibited[2]. Subsequently his tone became more vociferous. At a conference of jurists he now attacked Jews on the following grounds: (1) their polarity, (2) the nature of the Jewish intellect and therefore their questionable scholarly competence, and (3) the relation of Jewish thinking to the German spirit.

With regard to the first point it must be remembered that Jews in the Diaspora had lived for many centuries enclosed in ghettos, and, in spite of being underprivileged, they often enjoyed some special privileges not accorded to Christians. The nineteenth century witnessed their emancipation in Central Europe, and subsequently they entered universities and many became outstanding contributors to the various disciplines. By the turn of the century Jews were found to occupy crucial positions in almost every endeavor. Schmitt observed in this context that the "science" dealing with the soul of a race *(Rassenseelenkunde)* must not overlook the fact that Jews exist outside the confines of a state and soil they can call their own. Therefore, according to Schmitt, Jews are found to embrace such opposite ideas as "anarchist nihilism and positivist normativism ... sensual materialism and the most abstract moralism ...[3]."

Schmitt's diagnosis is somewhat reminiscent of his discussion of the Catholic church's *complexio oppositorum*, and also of the predicament of the romantics. Obviously, the major difference between the Jews

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[2] Carl Schmitt, "Die nationalsozialistische Gesetzgebung und der Vorbehalt des 'ordre public' im Internationalen Privatrecht," *Zeitschrift der Akademie für Deutsches Recht*, Heft 4, 1936, p. 208.

[3] Carl Schmitt, "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist," *Deutsche Juristen-Zeitung*, Heft 20, 1936, p. 1194.

and the Catholic church is that the former have not identified themselves with any isms as a unit, but only as individuals. Although a similarity exists between romantics and Jews in so far as neither possesses as a whole a basic political creed, nevertheless, the origins of the restless temper of both are not identical. While the rootlessness and restless temper of Jews may be traced to their misfortune of not having possessed a homeland, in the instance of the romantics this may be trailed to their displacement of God by the "genial 'I.'"

In studying Schmitt's attacks upon Jews and romantics one notes in these a revelation of his own temper. Some qualities he disliked in them are present in Schmitt. Not only did he reject the organized Catholic church, but his writings reveal that in addition to his being a jurist, he is also a successful "literateur". Only one point remained consistent in Schmitt's legal writings after he rejected the organized church, namely, his belief in monism as the sole solution to Germany's pluralist predicament. This situation during the Weimar period threatened to erupt into civil war. Consequently whoever could assure order and peace to Germany by putting an end to the centrifugal forces could count on Schmitt's allegiance. By having shifted his loyalty from the church, the possessor of *veritas*, to the state, the possessor of *potestas*, he did something he had condemned in 1914. He argued then that the different states are nothing more than products of history and victims of time (see Introduction), and he shared the view of Catholic authorities that the individual states are inferior to the all powerful church which recognizes no equal here on earth[4].

On the question of the competence of Jewish scholarship, Jewish authors no longer had to be cited. Thus German students began to plagiarize works written by Jews. Writings by Jews were considered inferior because of the connection between intellect and race. Schmitt observed in this context, and quite anti-Semitically, that the Jewish intellect is "unproductive and sterile[5]," and Jewish scholars must, therefore, not be recognized as competent sources. Concerned with the widespread German practice of plagiarizing Jewish authors, Schmitt insisted, however, that if a Jewish author had to be cited at all, he

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[4] Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen* (Tübingen: Verlag von J. C. B. Mohr [Paul Siebeck], 1914), pp. 44—46.

[5] Carl Schmitt, "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist," p. 1197.

must not be ignored but mentioned as a "Jewish author[6]." By insisting on this Schmitt had hoped to raise the respectability of German scholarship which had received mortal blows since 1933[7]. But Schmitt's own recently acquired attitude toward the Jews did not really permit him a great degree of objectivity, and therefore ambiguity and even self-deception can be easily detected in his attempt to raise the level of German scholarship.

On the relation of Jewish thinking to the German spirit Schmitt stated that

> The Jew has a parasitic, a tactical and merchant's relation to our intellectual work. Through his merchant talent he often has a sharp sense for the genuine .... This is his instinct as parasite and genuine merchant .... The Jews perceive quickly where German substance resides .... *He who has understood this truth ... also knows what race is*[8].

Here again Schmitt's Christian anti-Judaism was merged with outright anti-Semitism. The picture he painted in this instance is one widely held by German intellectuals, for German Jews made intellectual contributions out of proportion to their numbers in Germany.

Despite the anti-Semitism that Schmitt's assertion reveals, the last sentence indicates that it was far from a racial interpretation, for he did not mention the biological factor. In this spiritual anti-Semitic context may also be understood Schmitt's point made previously, namely, that the Nuremberg laws should be adhered to. Hitler had warned that in the event of non-adherence the National-Socialist party would intervene. This Schmitt wanted to avoid, for he feared the anti-religious consequences of such an intervention[9].

Though none of Schmitt's writings prior to 1933 betray any traces of anti-Semitism, this sudden outburst against Jews shows a relapse, with a new aspect, into theology. A point not shared by the author of this study is Schmitt's own interpretation: since his reputation was world-wide and since he had the vanity to consider himself the philosopher of the new regime he attempted to steer the party away from racialism and, if at all needed, direct it into the channel of traditional anti-

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[6] *Ibid.*, p. 1195.

[7] On this information I rely on my conversations with Professor Schmitt.

[8] Carl Schmitt, "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist," p. 1197. Italics are added.

[9] See Carl Schmitt's "Die Verfassung der Freiheit," *Deutsche Juristen-Zeitung*, Heft 19, 1935, p. 1135.

Judaism. Schmitt had hoped to place the Jewish question within the competence of the state rather than the party machinery[10]. His early remarks would certainly substantiate this interpretation, but the vociferous tone of his subsequent attacks are out of range with this explanation.

That Schmitt's anti-Judaism was not racial may be substantiated from his private correspondence with Franz Blei. We learn from Blei that Schmitt's sources of inspiration in hours of despair were the writings of Léon Bloy and the Good Friday liturgy[11]. Despite Bloy's hatred of the Jewish business mentality, expressed in a number of vicious outbursts, he rejected violent acts against Jews for they were, according to him, the religious predecessors of the Christians[12]. Bloy's religious attitude toward Jews may be best summarized by his assertion: *Salus ex Judaeis est* or *Le salut par les Juifs.* The Good Friday liturgy contained, until a few years ago, the requirement that every Catholic pray for the "perfidious Jew." Though this has led to many excesses on the part of Christians in the past, the liturgy's meaning is that Jews may not be physically abused.

Although Schmitt does not state so explicitly, there is no reason why Jews too could not have been integrated into the Schmittian concrete — order system, a kind of ghetto. Many Catholics in Germany were anxious to exclude Jews from public life, and not an unusual outlook among German Catholics was Wilhelm Reinermann's. Besides praising the National-Socialist victory and their measures of excluding Jews from the public domain[13], he considered Jews to be the main enemy of a Christian-German culture[14] because of their economic imperialism and culturally destructive tendencies[15].

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[10] This point emerged from the author's extensive conversations with Professor Schmitt.

[11] Franz Blei, "Der Fall Carl Schmitt: Von einem, der ihn kannte," *Der christliche Ständestaat,* Vienna, December 25, 1936, p. 1217.

[12] Léon Bloy, *Le salut par les Juifs* (Paris: Mercure de France, MCMXXXIII). In discussing Jews Schmitt occassionally mentioned Johann Georg Hamann's *Golgatha and Scheblimini.* We learn from Hamann that Jews are an old and noble people. *Golgatha und Scheblimini* (Explained by Lothar Schreiner; Gütersloh: Carl Bertelsmann Verlag, 1956), Vol. VII, p. 125.

[13] "Judentum und christliche Kultur," *Deutsches Volk — Katholische Monatsschrift für sozialen Aufbau und nationale Erziehung,* 1. Jahrgang, 1933/34, p. 209.

[14] *Ibid.,* p 214.

[15] *Ibid.,* p. 217. For a discussion of attempts made to fuse right-wing

It is indeed regrettable that Schmitt, this unusually gifted thinker, embarked upon an anti-Jewish course — especially at a time when he commanded respect in wide circles. At most other times his utterances would have been taken in stride as those of an anti-Semite, remarks which could have come from the pen of a converted Jew like Otto Weininger. But now the condition of Jews was perilous. His recently acquired anti-Semitism was certainly opportunistic in so far as no traces of this pernicious, parochial and provincial attitude can be detected in his writings prior to 1933. The type of opportunism Schmitt fell prey to is exactly what he called and condemned in his *Politische Romantik* as occasionalistic: "Where the occasional and accidental becomes the principle . . .[16]."

Despite Schmitt's outbursts his type of anti-Semitism failed in Nazi Germany. As soon as it became obvious to the Nazi authorities that Schmitt's views differed markedly from the "biological" interpretation of race, and because the SS, which took "political biology" seriously, became an important factor in Germany, Schmitt received a sharp rebuke. Although nothing had been said against him officially before December 1936, he felt that the language he had employed at the convention of jurists differed radically from those jurists who adhered to the SS interpretation of race (i. e., Hans Frank). Therefore, after the termination of the convention in November 1936, Schmitt resigned from his posts in the National-Socialist Jurists' Association.

2. Defeat

Though Schmitt attempted to sing the song of *Placebo*, doubts about his loyalty to the regime were raised as early as January 1935. His name was then mentioned by Himmler and Göring in connection with a *Putsch* which General von Fritsch, Chief of the General Staff, was supposed to have planned. Himmler and Göring accused von Fritsch of having invited Schmitt to deliver a lecture in which he was to prove that a *Putsch* may be legally executed. Fritsch denied both charges[17], and the matter rested. That Schmitt's name had been linked

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radicalism with Catholicism see Guenter Lewy's *The Catholic Church and Nazi Germany* (New York: McGraw-Hill Book Company, 1964), pp. 6—8.

[16] (2nd ed.; München: Duncker & Humblot, 1925), p. 22.

[17] Friedrich Hossbach, *Zwischen Wehrmacht und Hitler, 1934—1938* (Wol-

with von Fritsch in this instance may have had some connection with Schmitt's lecture on the Prussian "soldier-state" in which he tried to cement the force of the Reichswehr against the SA (VIII,1).

The second attack came on the heels of an exaggerated article written by one of Schmitt's former students, Günther Krauss[18]. In it he compared and drew a parallel between the stages of Schmitt's development and the two thousand year history of the German people. The starting point in both instances was Catholicism, proceeding to the state, and finally the *Reich*[19]. Moreover, Krauss added that Hitler's development, too, had started with Catholicism and before he had arrived at the *Reich* he had passed the stage of the Prussian state[20].

Das Schwarze Korps, the SS weekly, utilized the occasion of this publication to launch a bitter attack on Schmitt. The weekly asserted that Krauss was now justifying Schmitt's writings of the Weimar period. One would have thought that Schmitt who, according to *Das Schwarze Korps*, had supported political Catholicism and, since 1932, the pure theory of state[21], would have kept quiet after 1933. But the contrary was the case[22].

The inconsistencies of Schmitt's thoughts were pointed out in the following issue of the weekly[23]. The paper condemned him for opportunism on the following grounds: (1) racism, (2) political Catholicism, and (3) personal indecisiveness.

At the height of World War I, when many Germans fell on the battle field, Schmitt, *Das Schwarze Korps* charged, analyzed the concept of race as follows:

> The whole romanticism of race teaching rests on similar, namely morphological speculations, and persons who like to call themselves *Realpolitiker*,

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fenbüttel: Wolfenbütteler Verlagsanstalt GmbH., 1949), pp. 70, 71. Only in 1949 did Schmitt become aware of this episode.

18 "Von der Kirche über den Staat zum Reich," *Jugend und Recht*, No. 11, Autumn 1936.

19 *Das Schwarze Korps*, Folge 49, December 1936.

20 *Ibid.*

21 *Ibid.* By the pure theory of state is meant in this context Schmitt's support of the presidial system.

22 *Ibid.*

23 *Ibid.*, Folge 50.

make natural scientific, presumably exact race differentiations valid, but basically they mean moral significances *(Deutungen)* only[24].

Moreover, *Das Schwarze Korps* charged that many of Schmitt's friends were Jews, and that in 1930 — when Schmitt held the Hugo Preuss chair (he was a Jew and the father of the Weimar constitution) at the Graduate School of Business Administration in Berlin — he had stated that "the fate of the German intelligentsia and education will ... be identical with the fate of the Weimar constitution." *Das Schwarze Korps* pointed out that "unfortunately Carl Schmitt did not share the fate he predicted for the bourgeois intelligentsia .... On the contrary, in 1933 he became professor of public law at the University of Berlin[25]."

According to *Das Schwarze Korps,* Schmitt's active support of the Center party[26] and subsequently Brüning's government[27], must not be forgotten. In view of this *Das Schwarze Korps* quoted Schmitt on Catholicism. "'With each change of the political situation all principles seem to change with the exception of one, the power of Catholicism[28].'"

Das Schwarze Korps finally asserted that the preacher of decisionism was unable to make decisions pertaining to his own political convictions. *Abwarten* was his catchword until it was safe; and he felt safe after January 30, 1933. *Das Schwarze Korps* observed that

> Those who knew his personality and career witnessed silently and in full amazement that he suddenly understood how to become the defender of National Socialism[29].

Moreover, since a decision had been taken regarding Jews, Carl Schmitt too made his decision after 1933 and became an anti-Semite.

> He now found appropriate words against the harmful influence of Jews on the spiritual life. He proved clearly and impressively that a serious discussion between Jew and non-Jew is an internal impossibility. Silently all references and praises to his Jewish colleagues were erased from his books[30].

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[24] *Ibid.* The quotation comes from Schmitt's introduction to Theodor Däubler's *Nordlicht* (Munich: Georg Müller, 1916), p. 14.

[25] Folge 50.

[26] Schmitt never actively supported the Center party.

[27] Brüning ruled by decree and undertook stringent measures against the National Socialists. His chancellorship inaugurated the presidial system.

[28] This sentence comes from *RK* (1923), p. 10.

[29] Folge 50.

[30] *Ibid.*

But, *Das Schwarze Korps* asked: Did the Nazi decision against Jews really seriously affect Schmitt? What would Schmitt's decision be, for example, if the Catholic church suddenly assumed the right to distinguish friend from enemy: The paper stated that

> It is a basic National-Socialist belief that genuine achievement can only be gained from a proper attitude of the individual .... We are of the opinion that Professor Carl Schmitt has reason to believe in the exclamation: 'The Lord protect me from my consequences'[31].

Das Schwarze Korps attack made Schmitt's position in Nazi Germany precarious. He now had several alternatives: (1) to emigrate, (2) retire from all his activities and continue living in Germany, or (3) defend his intellectual stand.

Emigration for Schmitt was out of the question because he felt himself too deeply tied to German culture and its fate; moreover, his *volte face* after the enabling act of March 24, 1933, and his attacks on the Jews had cost him many of his former friends. With regard to the second alternative — to retire from all his activities and continue living in Germany — Schmitt did resign most of his offices even before the attack, but he continued lecturing at the University of Berlin and kept his post as Prussian Councillor of State. The third alternative — to defend his intellectual outlook since 1933 — was also out of the question in such a totalitarian system. Then what was Schmitt's actual situation in Germany between 1936 and 1945?

3. The Benito Cereno Myth

Schmitt's fate was shared by a number of other prominent people, and to explain the situation to themselves satisfactorily, they created a myth by turning to Herman Melville's *Benito Cereno*. Hence the much talked about Benito Cereno myth in Germany.

Benito Cereno, Spanish captain of the cargo boat *San Dominick*, intended to transport one hundred and sixty Negro slaves from the port of Valparaiso to Callao. After a week aboard the Negroes mutinied and killed many Spanish sailors, and then ordered Benito Cereno, under threat of death, to transport the Negroes to Senegal. Benito Cereno's boat was sighted by an American ship, and its

[31] *Ibid.*

captain, Amasa Delano, noticed from the distance a commotion and boarded the *San Dominick.* While aboard Delano was struck by the curious attitude of Benito Cereno and his attendant, the Negro Babo. Prior to Delano's boarding, Babo had threatened Benito Cereno, and cautioned him not to reveal to the American explicitly or by signs the past events and the present situation. Consequently, Delano did not perceive that Benito Cereno and the few remaining Spanish sailors were at the mercy of the Negroes. Only after Delano left the *San Dominick* and Benito Cereno leaped to freedom into Delano's boat to solicit help, did the latter realize the whole situation.

Schmitt felt that after 1936 his situation was to some extent similar to that of Don Benito, and his main concern was how to maneuver carefully under the circumstances prevailing in Germany[32]. It may be agreed with Schmitt that after December 1936 the situation had become somewhat dangerous. The mention of one's name in *Das Schwarze Korps* was often sufficient to seal an individual's fate for, as Edward Crankshaw observed, "the SS weekly newspaper, *Das Schwarze Korps,* was developed by Heydrich into an extremely powerful instrument of blackmail and persecution[33]."

Schmitt's situation worsened considerably after the July 1944 attempt on Hitler. In Kaltenbrunner's reports to Bormann and Hitler Schmitt's name appeared in connection with his contacts and friendship with Johannes Popitz[34] who was implicated in the plot and then executed.

Although Benito Cereno became a symbol for some Germans, Schmitt stated in retrospect, that no matter what circumstances one finds oneself in, intellect *(Geist)* remains essentially free[35]. But there is a difference between intellect remaining free in a totalitarian system,

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32 For a discussion of the Benito Cereno myth see Sava Kličković, "Benito Cereno: Ein moderner Mythos," *Epirrhosis: Festgabe für Carl Schmitt* (Edited by H. Barion, E.-W. Böckenförde, E. Forsthoff, and W. Weber; Berlin: Duncker & Humblot, 1968), Vol. I, pp. 265 ff.

33 *Gestapo* (New York: The Viking Press, 1956), p. 114.

34 See *Spiegelbild einer Verschwörung: Die Kaltenbrunner-Berichte an Bormann und Hitler über das Attentat vom 20. Juli 1944* (Stuttgart: Seewald Verlag, 1961), p. 117.

35 Carl Schmitt," Antwortende Bemerkungen zu einem Rundfunkvortrag von Karl Mannheim," *Ex Captivitate Salus: Erfahrungen der Zeit 1945/47* (Köln: Greven Verlag, 1950), p. 22.

and Don Benito's actual leap to freedom in order to solicit aid for the remaining captives. Schmitt did not contemplate emigrating from Germany, nor did he consider actively undermining the Nazi regime.

The Benito Cereno myth must be viewed as Schmitt's description of a specific situation. His use of the myth is applicable only to an individual's desperate situation in a totalitarian system. It symbolizes an utter helplessness to communicate this specific situation to the outside world.

Conclusion

Only three serious attempts have been made so far to confront Schmitt's *oeuvre* in its entirety: Peter Schneider's, Jürgen Fijalkowski's and Hasso Hofmann's. Despite Schneider's apt and challenging title[1] and his sometimes excellent reviews of the legal content of Schmitt's writings, these, nevertheless, lose their meaning because he works backwards from Schmitt's *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950), without taking into account the ever changing situations. A point made in my study is that Schmitt's ideas can be understood properly only if the concrete situation is borne in mind — namely the answers Schmitt tried to supply to specific questions. Furthermore, Schneider's enlistment of C. G. Jung's psychological categories to decipher Schmitt's *arcanum* is not only a curious approach to the study of constitutional law and legal as well as political theory, but also an invalid one.

Fijalkowski[2] categorically eliminates all legal points in his study and concludes that Schmitt's concepts are purely ideological and cannot therefore be considered as constituting political science. By having avoided concrete legal issues Fijalkowski's study erroneously implies that Schmitt's ideas even of the Weimar period were in harmony with the ideas of the Hitlerites. As in the instance of Schneider's study, by avoiding discussion of the concrete situations to which Schmitt had addressed himself, both authors treated his writings, to an extent, in a vacuum.

Hasso Hofmann[3] is considerably more enlightening. The author is profoundly aware of Schmitt's legal entanglements, and, as a rule, keeps in mind the historical context in which Schmitt's ideas

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[1] *Ausnahmezustand und Norm: Eine Studie zur Rechtslehre von Carl Schmitt* (Stuttgart: Deutsche Verlags-Anstalt, 1957).

[2] *Die Wendung zum Führerstaat: Ideologische Komponenten in der politischen Philosophie Carl Schmitts* (Köln: Westdeutscher Verlag, 1958).

[3] *Legitimität gegen Legalität: Der Weg der politischen Philosophie Carl Schmitts* (Neuwied und Berlin: Hermann Luchterhand Verlag GmbH., 1964).

developed. Nevertheless, Ernst-Wolfgang Böckenförde has pointed out that Hofmann often failed to see how Schmitt's intellectual thoughts overlapped with legal and political theory regarding the juristic problems Schmitt dealt with[4].

The present study is neither concerned with a demonological inquisition nor an ideological snooping. This study revolves on Schmitt's concepts and arguments as contained in his writings. Their political importance is undeniable, because some political ideas do emerge as a result of his intellectual heritage, and particularly due to his concern with specific legal questions within a concrete historical context.

From Schmitt's answers to concrete legal questions as well as from some of his other writings a model of a state can be abstracted. The state as a political unit is for him the first and foremost entity — superior to all other organizations or associations. He endowed the state with this superiority solely because of its political nature. After all, he argued that only the state can demand of its citizens the readiness to die. No other organization or association within the confines of the national sovereign state can make a similar claim.

Schmitt also opted for an authoritarian state. He arrived at this solution largely as a result of the trials and tribulations of the Weimar republic, particularly the attempts made on it by extremist parties and also its treatment by the leading foreign powers. However, his conservative Catholic and general intellectual heritage formed a strong foundation for his conclusion.

Schmitt's authoritarian or qualitative total state is headed by an all powerful sovereign whose main task is to preserve order, peace and stability. In the event of actual danger to the state his powers become almost unlimited. Underneath the sovereign the people are organized in a series of concrete orders reflecting essentially professional groupings. Representatives of these orders meet in a kind of parliament — not a liberal one — which is at the service of the sovereign, but, simultaneously, the sovereign assures its existence. The citizen of the state realizes himself within the confines of a particular concrete order.

With the Nazi victory it seemed to Schmitt for a while that his ideal would be fulfilled. In the new atmosphere he now attempted to

[4] *Die öffentliche Verwaltung* (Stuttgart: W. Kohlhammer, 1967), pp. 688—690. For a discussion of some of the literature which appeared on Schmitt see Piet Tommissen's review of Hasso Hofmann's study in *Archiv für Rechts- und Sozialphilosophie*, Vol. LI/1, 1965, pp. 153—160.

realize what he had failed to accomplish during the Weimar period, namely to forge an authoritarian state and justify powerful leadership. But it became clear to him by 1936 that the Nazi state was rapidly developing in one respect along lines of a quantitative total one: a state which interfered in every aspect of an individual's existence. In a veiled attack on the Nazi quantitative or totalitarian state Schmitt, in 1937, asserted that an authoritarian state is a mechanism for the protection of a citizen's physical existence[5]. In alluding to the Nazi quantitative state Schmitt pointed out that Hobbes' relation of protection and obedience did not permit a one sided demand for total obedience without assuring total protection[6].

From the viewpoint of the citizen the essential characteristic of Schmitt's authoritarian state is his acknowledgment of a private sphere which is similar to Hobbes'. In the *Leviathan* (Chapter 37) Hobbes distinguished between "faith" and "confession" and maintained that "faith" may be a private matter, but private judgment ceases as soon as public confession is at stake. Only then the sovereign may decide about the content of *veritas*[7]. Schmitt hinted in 1938 that despite Germany's strength vis-à-vis the outside world, the interference by the Nazis in the private sphere was having the effect of driving some people, and by insinuation also Schmitt, to seek refuge in their innermost region. At this point, according to Schmitt, "the counterforce of silence and stillness grows"[8].

It may be argued that Schmitt's decisionism left no room for "faith." Schmitt, the Catholic, never seriously entertained the thought of a marriage between the Catholic church and the German state in

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[5] Carl Schmitt, "Der Staat als Mechanismus bei Hobbes und Descartes," *Archiv für Rechts- und Sozialphilosophie,* Band XXX, Heft 4, 1937, p. 165.

[6] *Ibid.,* p. 163. In totalitarian Germany the fate of the citizen was far from certain. Because of Schmitt's situation as a result of the attacks against him by the Nazis as reflected in *Das Schwarze Korps,* he now became more concerned with the problem of an individual's physical existence in such a one-party state. Schmitt's thought on this question is similar to that of Hobbes in so far as Schmitt had in mind the citizen's right to life. See also Schmitt's "Die vollendete Reformation: Bemerkungen und Hinweise zu neuen Leviathan-Interpretationen," *Der Staat,* Band 4, Heft 1, 1965, pp. 61, 66.

[7] Carl Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes: Sinn und Fehlschlag eines politischen Symbols* (Hamburg: Hanseatische Verlagsanstalt, 1938), p. 85.

[8] *Ibid.,* p. 94.

which the Catholic religion would have become the official state religion. As early as 1922 he stated that "Alle prägnanten Begriffe der modernen Staatslehre sind *säkularisierte* theologische Begriffe[9]." This implies that the secularization process cannot be easily annulled.

Besides sanctioning "faith," did Schmitt recognize a general private sphere in which the sovereign may not interfere? Schmitt's decisionism refers mainly to the declaration of a state of exception. His notion of concrete orders implies the sovereign's hesitation to interfere with these in normal times. None of his Weimar period writings reveal that he entertained the thought of endowing the sovereign with absolute power over the individual. Schmitt's model was Mussolini's Italy, and his reign in the 1920's was neither absolute nor totalitarian. Schmitt did not change his mind about the nature of the sovereign's power after Hitler came to power. Schmitt's understanding of Hitler's role as ruler was that of a responsible one — at least to his own people. That his rule finally became nihilistic was implied by Schmitt in 1950. And under certain circumstances, according to Schmitt, it may be preferable to live in a state of anarchy rather than be subjected to a nihilistic government[10]. This certainly sanctions the people's right to rebel[11].

In reflecting on his Nazi "adventure," Schmitt once remarked that it is a duty under certain circumstances to advise a tyrant[12]. To Karl Mannheim's remark over the London radio in 1945 on the importance of comprehending someone in a particular situation *(in seinem Anders-sein)*, Schmitt added that intellect, too, can err[13]. Few will dispute this

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[9] *PT*, p. 49. Italics added.

[10] Carl Schmitt, *Donoso Cortés in gesamteuropäischer Interpretation* (Köln: Greven Verlag, 1950), pp. 9, 10.

[11] In my conversations with Professor Schmitt I asked whether he supported the July 20, 1944, attempt on Hitler. He replied negatively, despite the fact that one of his closest friends — Johannes Popitz — played a leading role in the events leading up to it and for which he paid with his life. Schmitt feared a complete breakdown inside Germany, because the Germans could not negotiate a settlement with the Allies as a result of the Allied demand for unconditional surrender.

[12] In a dialogue between Alexandre Kojève and Leo Strauss, *[De la tyrannie: Précédé de Hiéron, de Xénophon et suivi de tyrannie et sagesse* (Paris: Gallimard, 1954), pp. 261—262] Kojève asked the question: Whom should one advise if not the tyrant?

[13] Carl Schmitt, "Antwortende Bemerkungen zu einem Rundfunkvortrag

point. But whether his anti-Jewish remarks of the middle thirties can be considered those of an erring intellect is, indeed, doubtful.

The relation between protection and obedience is crucial for understanding Schmitt's political ideas. It is in this context that we can comprehend Schmitt's readiness to sacrifice certain civil liberties in exchange for protection. To rid Weimar of the threat of civil war Schmitt urged the need for a strong state. From 1933 on he was willing to go along with Hitler because he constituted the legal authority who assured stability. But Schmitt was rebuked in 1936 for having changed his mind about Nazism only after Hitler ascended to power. The Nazis labelled Schmitt an opportunist. But Schmitt's *volte face* was little else than what Hobbes had implied in the seventeenth century, namely, that it is not necessary to obey the legitimate sovereign, but only the person who has authority and power to put an end to any type of disturbance[14]. Because of the Nazi attack Schmitt's situation in Germany became somewhat precarious.

It is indeed curious that Schmitt who yearned for order, peace and stability, and therefore always argued for the need of a strong state, never achieved what he had in mind. The presidial system was a failure because of Hindenburg's strict interpretation in exercising the exceptional rights of Article 48. Subsequently Hitler turned Germany into a totalitarian system and succeeded in bringing Germany down to its knees — a worse fate than what happened at Versailles. Although economically successful, the Bonn government is competent to make decisions only over a part of Germany and, from the viewpoint of national defense, has to rely heavily on the United States.

Can Schmitt be classified as a political philosopher or political theorist? Not in the strictest sense of these terms. Schmitt's option for

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von Karl Mannheim," *Ex Captivitate Salus: Erfahrungen der Zeit 1945/47* (Köln: Greven Verlag, 1950), pp. 21 ff.

[14] The parallel with Hobbes is striking. In his self-defense Hobbes stated: "Do you think when a Battle is lost, and you at the Mercy of the Enemy, it is unlawful to receive Quarter with Condition of Obedience? Or if you receive it on that Condition, do you think it Honesty to break Promise, and treacherously murder him that gave you your life? If that were good Doctrine, he were a foolish Enemy that would give Quarter to any Man." "Considerations upon the Reputation, Loyalty, Manners, and Religion of Thomas Hobbes of Malmesbury. Written by himself by way of Letter to a Learned Person," *The Moral and Political Works of Thomas Hobbes of Malmesbury* (London, MDCCL), p. 691.

an authoritarian or qualitative total state applied to Germany only. He did not attempt to provide universal answers to questions pertaining to concrete situations in Germany. His distinction between commissarial and sovereign dictatorship is important in analyzing different types of dictatorship. Schmitt's definition of sovereignty is an aid in identifying where sovereignty actually resides. Most important is his theory of the "equal chance" in its relation to the political premiums of legal power. This was a serious problem in 1932—1933, and is still crucial in liberal democracies with strongly organized political parties which deny the basic constitutional foundation and are often included in coalition governments. The "equal chance" theory in its relation to the political premiums of legal power is the key to internal political situations in most liberal democracies. It is a borderline concept between legal and political science and also a decisive contribution to political theory.

In concluding this study something must finally be said of the controversies surrounding Schmitt's writings and personality. Apart from academic jealousies due to his brilliance and intellectual output, and some political opponents who administer political justice at colleges and universities under the guise of scholarship, Schmitt never hesitated to become involved in burning legal and political questions of the day. Therefore one is reminded of Michael Oakeshott's observation that Hobbes would have been the foremost scapegoat had Machiavelli not admirably occupied this useful position[15]. As a "docile" disciple of Hobbes, Schmitt appears to be predestined to an analogous fate. For having participated in the Nazi venture he is serving, today in Germany, as a convenient scapegoat, as did Machiavelli and Hobbes in their respective times. At the same time his important legal theoretical contributions are silently adopted. For example, Schmitt's fight against a purely functional approach to the Weimar constitution, namely, that any qualified majority may abrogate its basic form of

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15 Thomas Hobbes, *Leviathan, or the Matter, Forme, and Power of a Commonwealth Ecclesiasticall and Civill* (Edited with an introduction by Michael Oakeshott; Oxford: Basil Blackwell, 1957), p. li. "... that the vilification of Hobbes was no greater is due only to the fact that Machiavelli had already been cast for the part of scapegoat for the European consciousness." See also Julien Freund's preface to Francis Rosenstiel's *Le principe de 'supranationalité: essai sur les rapports de la politique et du droit* (Paris: Éditions A. Pedonne, 1962), pp. 15—16.

government, has had a profound influence on the drafters of the Bonn constitution. This document acknowledges, in its text, sacrosanct parts and limits the power of parliamentary majorities to amend it (Article 79). On this point some attacks levelled against him and his interpretation of the constitution during the Weimar period, have been refuted by the provisions of the Bonn document.

Bibliography

For a compilation of an almost complete bibliography of Carl Schmitt's writings by Piet Tommissen see *Festschrift für Carl Schmitt* (Edited by Hans Barion, Ernst Forsthoff and Werner Weber; Berlin: Duncker & Humblot, 1959), and *Epirrhosis: Festgabe für Carl Schmitt* (Edited by Hans Barion, Ernst-Wolfgang Böckenförde, Ernst Forsthoff and Werner Weber; Berlin: Duncker & Humblot, 1968, 2 volumes). The writings cited below are those utilized in this study.

1. Works by Schmitt

"Answers in Nuremberg," *Personal Papers,* II, April 28, 1947, pp. 1—8.

"Das Gesetz zur Behebung von Volk und Reich," *Deutsche Juristen-Zeitung,* Heft 7, 1933, pp. 455—458.

"Das Reichstatthaltergesetz," *Das Recht der nationalen Revolution.* Berlin: Carl Heymanns Verlag, 1933. Heft 3, pp. 3—24.

Der Begriff des Politischen. München: Duncker & Humblot, 1932, 1963.

Der Hüter der Verfassung. Tübingen: Verlag von J. C. B. Mohr [Paul Siebeck], 1931.

Der Leviathan in der Staatslehre des Thomas Hobbes: Sinn und Fehlschlag eines politischen Symbols. Hamburg: Hanseatische Verlagsanstalt, 1938.

Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum. Köln: Greven Verlag, 1950.

"Der Staat als Mechanismus bei Hobbes und Descartes," *Archiv für Rechts- und Sozialphilosophie,* Band XXX, Heft 4, 1937, pp. 158—168.

Der Wert des Staates und die Bedeutung des Einzelnen. Tübingen: J. C. B. Mohr (Paul Siebeck), 1914.

"Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist," *Deutsche Juristen-Zeitung,* Heft 20, 1936, pp. 1193—1199.

Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf. München: Duncker & Humblot, 1921, 1928.

Die geistesgeschichtliche Lage des heutigen Parlamentarismus. München: Duncker & Humblot, 1923, 1926.

"Die geschichtliche Struktur des heutigen Welt-Gegensatzes von Ost und West: Bemerkungen zu Ernst Jüngers Schrift 'Der gordische Knoten,'" *Freundschaft-*

liche Begegnungen: Festschrift für Ernst Jünger zum 60. Geburtstag. Edited by Armin Mohler; Frankfurt am Main: V. Klostermann, 1955.

"Die nationalsozialistische Gesetzgebung und der Vorbehalt des 'ordre public' im Internationalen Privatrecht," *Zeitschrift der Akademie für Deutsches Recht,* Heft 4, 1936, pp. 204—211.

"Die Verfassung der Freiheit," *Deutsche Juristen-Zeitung,* Heft 19, 1935, pp. 1133—1135.

"Die vollendete Reformation: Bemerkungen und Hinweise zu neuen Leviathan-Interpretationen," *Der Staat,* Band 4, Heft 1, 1965, pp. 51—69.

"Diktatur und Belagerungszustand," *Zeitschrift für die gesamte Strafrechtswissenschaft,* (XXXVIII), 1917, pp. 138—162.

Donoso Cortés in gesamteuropäischer Interpretation. Köln: Greven Verlag, 1950.

"Ein Jahr nationalsozialistischer Verfassungsstaat," *Deutsches Recht,* 1934, pp. 27—30.

Ex Captivitate Salus: Erfahrungen der Zeit 1945/1947. Köln: Greven Verlag, 1950:

"Antwortende Bemerkungen zu einem Rundfunkvortrag von Karl Mannheim;"
"Ex Captivitate Salus;"
"Zwei Gräber."

"Franz Blei," *Frankfurter Zeitung,* March 22, 1931.

Gesetz und Urteil: Eine Untersuchung zum Problem der Rechtspraxis. Berlin: Otto Liebmann, 1912.

Hugo Preuss: Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre. Tübingen: J. C. B. Mohr [Paul Siebeck], 1930.

Legalität und Legitimität. München: Duncker & Humblot, 1932.

"Nationalsozialismus und Rechtsstaat," *Deutsche Verwaltung,* No. 3, 1934, pp. 35—42.

"Nationalsozialistisches Rechtsdenken," *Deutsches Recht,* No. 10, 1934, pp. 225—229.

Politische Romantik. 2nd ed.; München: Duncker & Humblot, 1925.

Politische Theologie: Vier Kapitel zur Lehre von der Souveränität. 2nd ed.; München: Duncker & Humblot, 1934.

Positionen und Begriffe im Kampf mit Weimar — Genf — Versailles 1923—1939. Hamburg: Hanseatische Verlagsanstalt, 1940:

"Das Zeitalter der Neutralisierung und Entpolitisierung" (1929);

"Der Führer schützt das Recht" (1934);

"Der unbekannte Donoso Cortés" (1929);

"Donoso Cortés in Berlin, 1849" (1927);

"Grossraum gegen Universalismus" (1939);

"Neutralität und Neutralisierung: Zu Christoph Steding 'Das Reich und die Krankheit der europäischen Kultur'" (1939);

"Schlußrede vor dem Staatsgerichtshof in Leipzig" (1932);

"Staatsethik und pluralistischer Staat" (1930);

"Weiterentwicklung des totalen Staats in Deutschland" (January 1933);

"Wesen und Werden des faschistischen Staates" (1927).

Römischer Katholizismus und politische Form. Hellerau: Jakob Hegner, 1923; München: Theatiner Verlag, 1925.

Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit. 3rd ed.; Hamburg: Hanseatische Verlagsanstalt, 1935.

Staatsgefüge und Zusammenbruch des zweiten Reiches: Der Sieg des Bürgers über den Soldaten. Hamburg: Hanseatische Verlagsanstalt, 1934.

"Starker Staat und gesunde Wirtschaft," *Volk und Reich,* Heft 2, 1933.

Theorie des Partisanen: Zwischenbemerkung zum Begriff des Politischen. Berlin: Duncker & Humblot, 1963.

Über die drei Arten des Rechtswissenschaftlichen Denkens. Hamburg: Hanseatische Verlagsanstalt, 1934.

Verfassungslehre. 3rd ed.; Berlin: Duncker & Humblot, 1957.

Verfassungsrechtliche Aufsätze aus den Jahren 1924—1954: Materialien zu einer Verfassungslehre. Berlin: Duncker & Humblot, 1958:

"Das Problem der Legalität" (1950);

"Die staatsrechtliche Bedeutung der Notverordnung, insbesondere ihre Rechtsgültigkeit" (1931);

"Freiheitsrechte und institutionelle Garantien" (1931);

"Grundrechte und Grundpflichten" (1932);

"Wohlerworbene Beamtenrechte und Gehaltskürzung" (1931).

Volksentscheid und Volksbegehren: Ein Beitrag zur Auslegung der Weimarer Verfassung und zur Lehre von der unmittelbaren Demokratie. Berlin: Walter de Gruyter, 1927.

"Was bedeutet der Streit um den 'Rechtsstaat'?" *Zeitschrift für die gesamte Staatswissenschaft,* Vol. 95, Heft 2, 1935, pp. 189—201.

II. Other Books and Articles Cited in the Footnotes

Anschütz, Gerhard. *Die Verfassung des Deutschen Reichs vom 11. August 1919.* 11th ed.; Berlin: Verlag von Georg Stilke, 1929.

— *Kommentar zur Reichsverfassung.* 14th ed.; 1932.

Arendt, Hannah. *The Origins of Totalitarianism.* New York: Harcourt, Brace and Company, 1951.

Ballweg, Ottmar. *Zu einer Lehre von der Natur der Sache.* Basel: Helbing & Lichtenhahn, 1960.

Baring, Arnulf. "Ein Hüter der Verfassung?: General de Gaulle und die fünfte französische Republik," *Deutsches Verwaltungsblatt,* Heft 3, 1961, pp. 101—108.

Blei, Franz. "Der Fall Carl Schmitt: Von einem, der ihn kannte," *Der christliche Ständestaat.* Vienna, December 25, 1936.

Bloy, Léon. *Les salut par les Juifs.* Paris: Mercure de France, MCMXXXIII.

Bodin, Jean. *Les six Livres de la Republique.* 2nd French ed.; Paris: Chez Jacques du Puys, 1580. Reprinted in 1583.

Böckenförde, Ernst-Wolfgang. Book review of Hasso Hofmann's *Legitimität gegen Legalität,* in *Die öffentliche Verwaltung.* Stuttgart: Verlag W. Kohlhammer, GmbH., 1967, pp. 688—690.

— "Der deutsche Katholizismus im Jahr 1933," *Hochland,* Heft 3, 1961, pp. 215—239.

— *Die deutsche verfassungsgeschichtliche Forschung im 19. Jahrhundert: Zeitgebundene Fragestellungen und Leitbilder.* Berlin: Duncker & Humblot, 1961.

Bracher, Karl Dietrich. *Die Auflösung der Weimarer Republik.* 3rd ed.; Stuttgart: Ring Verlag, 1960.

— *Nationalsozialistische Machtergreifung und Reichskonkordat.* Wiesbaden: Hessische Landesregierung, 1956.

Brecht, Arnold. *Prelude to Silence.* New York: Oxford University Press, 1944.

Brüning, Heinrich. "Letter to Rudolf Pechel," *Deutsche Rundschau,* Heft 7, 1947, pp. 1—22.

Brunet, René *The New German Constitution.* Foreword by Charles A. Beard; New York: Alfred A. Knopf, 1928.

Capitant, René. "Le rôle politique du President du Reich," *Revue de doctrine et d'áction politique.* Paris, March 15, 1932, pp. 216—229.

Collingwood, R. G. *An Autobiography.* 2nd ed.; London: Oxford University Press, 1951.

Crankshaw, Edward. *Gestapo.* New York: The Viking Press, 1956.

Das Gesetz für die Stunde der Not: Materialien zur Auseinandersetzung über ein Sicherheitserfordernis. Bonn: Bundesministerium des Innern, 1961.

Das Schwarze Korps. Folge 49 and 50, December 1936.

Däubler, Theodor. *Nordlicht.* Introduction by Carl Schmitt; München: Georg Müller, 1916.

Deane, Herbert A. *The Political Ideas of Harold J. Laski.* New York: Columbia University Press, 1958.

Duverger, Maurice. *De la dictature.* Paris: Julliard, 1961.

Emerson, Rupert. *State and Sovereignty in Modern Germany.* New Haven: Yale University Press, 1928.

Epirrhosis: Festgabe für Carl Schmitt. Edited by Hans Barion, Ernst-Wolfgang Böckenförde, Ernst Forsthoff, Werner Weber. 2 vols. Berlin: Duncker & Humblot, 1968:
Kličković, Sava. "Benito Cereno — Ein moderner Mythos;"
Schwab, George. "Enemy oder Foe: Der Konflikt der modernen Politik;"
Tommissen, Piet. "Ergänzungsliste zur Carl-Schmitt-Bibliographie vom Jahre 1959."

Festschrift für Carl Schmitt. Edited by Hans Barion, Ernst Forsthoff, Werner Weber; Berlin: Duncker & Humblot, 1959:
Tommissen, Piet. "Carl-Schmitt-Bibliographie."

Fijalkowski, Jürgen. *Die Wendung zum Führerstaat: Ideologische Komponenten in der politischen Philosophie Carl Schmitts.* Köln: Westdeutscher Verlag, 1958.

Fraenkel, Ernst. *The Dual State.* Translated from the German by E. A. Shils, E. Lowenstein and K. Knorr; New York: Oxford University Press, 1941.

Frank, Hans. "'Der deutsche Rechtsstaat Adolf Hitlers,'" in *Deutsches Recht,* No. 6, 1934, pp. 121—123.

Freund, Julien. *L'essence du politique.* Paris: Éditions Sirey, 1965.

Friedmann, Wolfgang. *Legal Theory.* 3rd ed.; London: Stevens and Sons Limited, 1953.

Giese, F. *Die Reichsverfassung vom 11. August 1919.* 6th ed.; Berlin: Carl Heymanns Verlag, 1925.

Gross-Fengels, Kurt. *Der Streit um den Rechtsstaat.* Marburg: Nolte, 1936.

Halperin, S. William. *Germany Tried Democracy.* W. W. Norton & Company, Inc., 1965.

Hamann, Johann Georg. *Golgatha und Scheblimini.* Explanation by Lothar Schreiner; Gütersloh: Carl Bertelsmann Verlag, 1956. Vol. VII.

Handbuch des Deutschen Staatsrechts. Edited by Gerhard Anschütz and Richard Thoma; Tübingen: J. C. B. Mohr [Paul Siebeck], 1930. Vol. I.

Hegel, G. W. F. *Philosophy of Right.* Translated with notes by T. M. Knox; Oxford: At the Clarendon Press, 1953.

Heiden, Konrad. *A History of National Socialism.* New York: Alfred A. Knopf, 1935.

— *Der Führer: Hitler's Rise to Power. Boston:* Houghton Mifflin Company, 1944.

Hiller, Kurt. "Kameradschaftliche Note," in *Köpfe und Tröpfe.* Hamburg: Rowohlt, 1950.

Hitler, Adolf. *Mein Kampf.* Unexpurgated edition; New York: Stackpole Sons, 1939.

Hobbes, Thomas. *Leviathan, or the Matter, Forme, and Power of a Commonwealth Ecclesiasticall and Civill.* Introduction by Pogson Smith; London: Oxford University Press, 1952. Also cited in this study is the edition edited and introduced by Michael Oakeshot; Oxford: Basil Blackwell, 1957.

— "Considerations upon the Reputation, Loyalty, Manners, and Religion of Thomas Hobbes of Malmesbury. Written by himself by way of Letter to a Learned Person," *The Moral and Political Works of Thomas Hobbes of Malmesbury.* London, MDCCL.

Hofer, Walther. (ed.). *Der Nationalsozialismus: Dokumente 1933—1945.* Frankfurt a/M: Fischer Bücherei, 1957.

Hofmann, Hasso. *Legitimität gegen Legalität: Der Weg der politischen Philosophie Carl Schmitts.* Neuwied und Berlin: Hermann Luchterhand Verlag, GmbH., 1964.

Höhn, Reinhard. *Vom Wesen der Gemeinschaft.* 1934.

— *Rechtsgemeinschaft und Volksgemeinschaft.* Hamburg: Hanseatische Verlagsanstalt, 1935.

Hossbach, Friedrich. *Zwischen Wehrmacht und Hitler, 1934—1938.* Wolfenbüttel: Wolfenbütteler Verlagsanstalt GmbH., 1949.

Huber, Ernst Rudolf. *Verfassungsrecht des Grossdeutschen Reiches.* 2nd enlarged edition; Hamburg: Hanseatische Verlagsanstalt, 1939.

Jahrbuch des öffentlichen Rechts der Gegenwart. Tübingen: Verlag von J. C. B. Mohr [Paul Siebeck], 1934. Band 21, 1933/34.

Jünger, Ernst. *Strahlungen.* Tübingen: Heliopolis-Verlag, 1949.

Kelsen, Hans. *Das Problem der Souveränität und die Theorie des Völkerrechts.* Tübingen: J. C. B. Mohr [Paul Siebeck], 1920.

— *Der Staat als Übermensch: Eine Erwiderung.* Wien: Julius Springer, 1926.

Kennedy, John Joseph. *Donoso Cortés as Servant of the State.* New York: Unpublished Ph. D. Dissertation, Columbia University, 1954.

Kirchheimer, Otto. "Criminal Law in National-Socialist Germany," *Studies in Philosophy and Social Science,* VIII, 1939/40, pp. 444—463.

Kleist-Schmenzin, Ewald v. "Die letzte Möglichkeit," *Politische Studien,* No. 106, 1959, pp. 89—92.

Klemperer, Klemens v. *Germany's New Conservatism: Its History and Dilemma in the Twentieth Century.* Foreword by Sigmund Neumann; Princeton: Princeton University Press, 1957.

Koellreutter, Otto. *Grundriss der Allgemeinen Staatslehre.* Tübingen: Verlag von J. C. B. Mohr [Paul Siebeck], 1933.

Kojève, Alexandre and Strauss, Leo. *De la tyrannie: Précédé de Hiéron, de Xénophon et suivi de tyrannie et sagesse.* Paris: Gallimard, 1954.

Krabbe, Hugo. *The Modern Idea of State.* Authorized translation and introduction by G. H. Sabine and W. J. Shepard; New York: D. Appleton and Company, 1922.

Krauss, Günther and Schweinichen, Otto v. *Disputation über den Rechtsstaat.* Introduction by Carl Schmitt; Hamburg: Hanseatische Verlagsanstalt, 1935.

Krauss, Günther, "Von der Kirche über den Staat zum Reich," *Jugend und Recht,* No. 11, Autumn 1936.

Krockow, Christian Graf v. *Die Entscheidung: Eine Untersuchung über Ernst Jünger, Carl Schmitt, Martin Heidegger.* Stuttgart: Ferdinand Enke Verlag, 1958.

Laski, Harold J. *A Grammar of Politics.* London: George Allen and Unwin, 1925.

— *Studies in the Problem of Sovereignty.* New Haven: Yale University Press, 1917.

Laufer, Heinz. *Das Kriterium politischen Handelns: Versuch einer Analyse und konstruktiven Kritik der Freund-Feind-Unterscheidung auf der Grundlage der Aristotelischen Theorie der Politik. Zugleich ein Beitrag zur Methodologie der politischen Wissenschaften.* Würzburg: Unpublished Ph. D. Dissertation, Bayerische Julius-Maximilian-Universität zu Würzburg, 1961.

Lenin, V. I. *Der 'Radikalismus' die Kinderkrankheit des Kommunismus.* Leipzig: Franckes Verlag GmbH., 1920.

Lewy, Guenter. *The Catholic Church and Nazi Germany.* New York: McGraw-Hill Book Company, 1964.

Lichtenberger, Henri. *The Third Reich. 4th printing.* Translated from the French and edited by Koppel S. Pinson; New York: The Greystone Press, 1939.

Lukács, Georg. *Geschichte und Klassenbewusstsein.* Berlin: Der Malik Verlag, 1923.

Marx, K. *Die Klassenkämpfe in Frankreich 1848—1850.* Introduction by F. Engels; Berlin: Verlag Buchhandlung Vorwärts Paul Singer GmbH., 1911.

Mattern, Johannes. *Principles of the Constitutional Jurisprudence of the National German Republic.* Baltimore: The John Hopkins Press, 1928.

Matthias, Erich and Morsey, Rudolf. (eds.). *Das Ende der Parteien.* Düsseldorf: Droste Verlag, 1960.

Gaertringen, Friedrich Frhr. Hiller v. "Die Deutschnationale Volkspartei;" Morsey, Rudolf. "Die Deutsche Zentrumspartei."

Mau, Hermann and Krausnick, Helmut. *Deutsche Geschichte der jüngsten Vergangenheit, 1933—1945.* 2nd ed.; Stuttgart: J. B. Metzlersche Verlagsbuchhandlung, 1956.

Maunz, Theodor. *Deutsches Staatsrecht.* 15th ed.; München: Beck'sche Verlagsbuchhandlung, 1966.

Max Weber und die Soziologie heute: Verhandlungen des fünfzehnten deutschen Soziologentages. Edited by Otto Stammer and Rolf Ebinghausen; Tübingen: J. C. B. Mohr [Paul Siebeck], 1965.

Meyer, Georg. *Lehrbuch des Deutschen Staatsrechts.* 7th ed.; Edited by G. Anschütz; München: Duncker & Humblot, 1919. Vol. III.

Mommsen, Wolfgang, J. *Max Weber und die deutsche Politik 1890—1920.* Tübingen: J. C. B. Mohr [Paul Siebeck], 1959.

Morsey, Rudolf. (ed.). "Unterredung des Reichskanzlers Hitler und des Reichsinnenministers Frick mit den Zentrumsführern Kaas und Perlitius" (January 31, 1933), *Vierteljahrshefte für Zeitgeschichte,* Heft 2, 1961, pp. 182—191.

Morstein Marx, Fritz. *Government in the Third Reich.* Foreword by W. Y. Elliott; 2nd ed.; New York: McGraw-Hill Book Company, 1937.

Mosse, George, L. *The Crisis of German Ideology: Intellectual Origins of the Third Reich.* New York: Grosset & Dunlap, 1964.

Nahm, Milton, C. (ed.). *Selections from Early Greek Philosophy.* 3rd ed.; New York: F. S. Crofts & Co., 1947.

Neesse, Gottfried. *Partei und Staat.* Hamburg: Hanseatische Verlagsanstalt, 1936.

Neumann, Franz. *Behemoth.* 2nd ed.; New York: Oxford University Press, 1944.

— *Letter to Carl Schmitt.* September 7, 1932.

Nolte, Ernst. *Three Faces of Fascism.* Translated from the German by Leila Vennewitz; New York: Holt, Rinehart and Winston, 1966.

Nyomarkay, Joseph. *Charisma and Factionalism in the Nazi Party.* Minneapolis: University of Minnesota Press, 1967.

Preussen contra Reich vor dem Staatsgerichtshof: Stenogrammbericht der Verhandlungen vor dem Staatsgerichtshof in Leipzig vom 10. bis 14. und vom 17. Oktober 1932. Berlin: J. H. W. Dietz Nachf., GmbH., 1933.

Reichsgesetzblatt, 1921, No. 68; 1930, I, No. 9; 1933, I, Numbers 7, 17, 25, 50, 52, 81, 108, 135; 1934, I, No. 71.

Reinermann, Wilhelm. "Judentum und christliche Kultur," *Deutsches Volk — Katholische Monatsschrift für sozialen Aufbau und nationale Erziehung*, 1. Jahrgang, 1933—1934, pp. 209—217.

Reiss, Hans Siegbert. (ed.). *The Political Thought of the German Romantics, 1793—1815*. Oxford: Basil Blackwell, 1955.

Rosenbaum, Eduard. "Carl Schmitt vor den Toren," *Rheinischer Merkur*, No. 48, November 1950.

Rosenstiel, Francis. *Le principe de 'supranationalité': essai sur les rapports de la politique et du droit*. Preface by Julien Freund; Paris: Éditions A. Pedonne, 1962.

Rossiter, Clinton L. *Constitutional Dictatorship*. Princeton: Princeton University Press, 1948.

Rostovtzeff, Michael Ivanovich. *Rome*. Translated from the Russian by J. D. Duff; A Galaxy Book; New York: Oxford University Press, 1960.

Rousseau, J. J. *The Social Contract and Discourses*. Translated with an introduction by G. D. H. Cole; New York: E. P. Dutton and Company, 1950.

Schellenberg, Walter. *The Schellenberg Memoirs*. Introduction by Alan Bullock; London: Andre Deutsch, 1956.

Schneider, Hans. "Das Ermächtigungsgesetz vom 24. März 1933: Bericht über das Zustandekommen und die Anwendung des Gesetzes," *Schriftenreihe der Bundeszentrale für Heimatdienst*. Zweite erweiterte Auflage, Heft 10, 1961.

Schneider, Peter. *Ausnahmezustand und Norm: Eine Studie zur Rechtslehre von Carl Schmitt*. Stuttgart: Deutsche Verlags-Anstalt, 1957.

Schultes, Karl. *Die Jurisprudenz zur Diktatur des Reichspräsidenten nach Artikel 48, Abschnitt II der Weimarer Verfassung*. Bonn: Ludwig Röhrscheid, 1934.

Schwinge, Erich and Zimmerl, Leopold. *Wesenschau und konkretes Ordnungsdenken im Strafrecht*. Bonn: Ludwig Roehrscheid, 1937.

Seabury, Paul. *The Wilhelmstrasse*. Berkeley: University of California Press, 1954.

Smend, Rudolf. *Verfassung und Verfassungsrecht*. München: Duncker & Humblot, 1928.

Sontheimer, Kurt. *Antidemokratisches Denken in der Weimarer Republik: Die politischen Ideen des deutschen Nationalismus zwischen 1918 und 1933*. 2nd ed.; Munich: Nymphenburger Verlagshandlung, 1964.

— "Carl Schmitt: Seine 'Loyalität' gegenüber der Weimarer Verfassung," *Neue politische Literatur*, III. Jahrgang, Heft 10, 1958, pp. 757—770.

Spiegelbild einer Verschwörung: Die Kaltenbrunner-Berichte an Bormann und Hitler über das Attentat vom 20. Juli 1944. Stuttgart: Seewald Verlag, 1961.

Stewart, John Hall. *A Documentary Survey of the French Revolution.* New York: The Macmillan Company, 1951.

Strauss, Leo. "Anmerkungen zu Carl Schmitts 'Begriff des Politischen,'" *Archiv für Sozialwissenschaft und Sozialpolitik,* 67. Band, Heft 6, 1932, pp. 732—749.

— *Natural Right and History.* 2nd ed.; Chicago: The University of Chicago Press, 1957.

Tägliche Rundschau, July 19, 1932.

Talmon, Jacob L. *The Origins of Totalitarian Democracy.* London: Secker and Warburg, 1955.

Tatarin-Tarnheyden, Edgar. *Werdendes Staatsrecht.* Berlin: Carl Heymanns Verlag, 1934.

Taylor, Telford. *Sword and Swastika.* New York: Simon and Schuster, 1952.

The Oxford English Dictionary. Oxford: At the Clarendon Press, 1933. Volumes III and IV.

Thoma, Richard. "Die Funktionen der Staatsgewalt," *Handbuch des Deutschen Staatsrechts.* 2nd ed.; Edited by G. Anschütz and R. Thoma; Tübingen: Verlag von J. C. B. Mohr [Paul Siebeck], 1932.

— "Zur Ideologie des Parlamentarismus und der Diktatur," *Archiv für Sozialwissenschaft und Sozialpolitik,* 53. Band, Heft 1, 1925, pp. 212—217.

Tommissen, Piet. Book review of Hasso Hofmann's *Legitimität gegen Legalität* in *Archiv für Rechts- und Sozialphilosophie,* LI/1, 1965, pp. 153—160.

Verhandlungen des Reichstags. Berlin 1936. Vol. 458.

Watkins, Frederick M. *The Failure of Constitutional Emergency Powers under the German Republic.* Cambridge: Harvard University Press, 1939.

Weber, Max. *Staatssoziologie.* Edited by Johannes Winckelmann; Berlin: Duncker & Humblot, 1956.

— *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie.* Edited by Johannes Winckelmann; 4th ed.; 1. Halbband; Tübingen: J. C. B. Mohr [Paul Siebeck], 1956.

Ziegler, H. O. *Autoritärer oder totaler Staat.* Tübingen: J. C. B. Mohr [Paul Siebeck], 1932.

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